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No. 34

In the Supreme Court of the United States

OCTOBER TERM, 1950

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In this reply brief, we shall consider only certain issues raised by the respondent's brief.

1. *The ineligibility for citizenship imposed by Section 3 (a) of the Selective Training and Service Act of 1940 has not been terminated.* The respondent and the amicus curiae contend that the ineligibility for citizenship which Section 3 (a) of the Selective Training and Service Act, as amended, imposed upon neutrals who claimed exemption from military service, expired on March 31, 1947, pursuant to Section 16 (b) of the Act. Section 16 (b), as amended, reads as follows:

> The provisions of the third sentence of section 3 (a) of this Act shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act, except the provisions of sections 3 (b), 3 (c), 3 (d), 8 and 16 (b), and the fourth and fifth provisos of the second sentence of section 3 (a), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date. [54 Stat. 897, 59 Stat. 166, 60 Stat. 181, 342, 50 U. S. C. App. § 316 (b).]

The Government contends that this bar to citizenship continues in effect notwithstanding the provisions of Section 16 (b).

It is clear that in Section 3 (a) Congress intended to penalize any neutral alien who claimed exemption from military service by providing that he "shall *thereafter* be debarred from becoming a citizen of the United States" (Emphasis supplied). The ineligibility for citizenship became complete and final when the neutral alien applied for and obtained exemption from military service. In view of the purposes of the Selective Training and Service Act, it is inconceivable that the Congress intended this ineligibility for citizenship to endure for only the period of hostilities during which the alien enjoyed freedom from military

service. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absured conclusion." *Lau Ow Beu* v. *United States,* 144 U. S. 47, 59.

However, the Congress has not left its purpose to inference. Such bars to citizenship have appeared in Section 2 of the Selective Draft Act of 1917, as amended (40 Stat. 76, 884), in Section 3 (a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 55 Stat. 844), and in Section 4 (a) of the Selective Service Act of 1948 (62 Stat. 604; 50 U. S. C. App., Supp. III, 454). Without more, this consistent legislative policy to deny citizenship to neutral aliens who claim exemption from service clearly indicates that Congress intended such bars to be permanent except where it affirmatively acts to end the bar. This is made particularly clear by the history of the disqualification for citizenship imposed by the Selective Draft Act of 1917, as amended.

During World War I, liability for military service was extended only to aliens who had declared their intention to become American citizens. In 1918, Section 2 of the Selective Draft Act was amended (40 Stat. 885) to provide that

> * * * a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from

> liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.[1]

There was no specific statute terminating the World War I Selective Draft Act. The local boards organized under that statute ended their activities December 10, 1918, and their records were thereafter sealed. *Second Report of Provost Marshal General* (1919), p. 3. The only legislative termination appears to have been accomplished by Public Resolution 64 of March 3, 1921, 41 Stat. 1359, which was the resolution terminating World War I and ending statutes which were dependent upon the termination of that conflict.[2]

However, by subsequent legislation the Congress clearly indicated that it regarded the bar to citizenship incurred by neutral aliens under Section 2 of the 1917 Act as remaining in effect

[1] For the reasons leading to this amendment, see III Hackworth, *Digest of International Law*, 598 et seq.

[2] A proviso, 41 Stat. 1360, stipulated, "That nothing herein contained shall be construed as effective * * * to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statute, p. 76), of any person who failed to comply with the provisions of said Act, or Acts amendatory thereof."

indefinitely, notwithstanding the general expiration of that statute. First, the ineligibility to citizenship was carried into the 1925 edition of the United States Code as Section 366 of Title 8. In 1931, Congress recognized the continuing nature of this ineligibility in limiting its future application by providing (Act of February 11, 1931, 46 Stat. 1087):

> That, notwithstanding any provision of law to the contrary, no alien shall be debarred from becoming a citizen of the United States on the ground that he withdrew his intention to become a citizen of the United States in order to secure discharge from the military service, if such withdrawal (and the application therefor) and discharge took place after November 11, 1918.

The reports of both the House and Senate Committees, which considered this 1931 legislation, expressly recognized the continuing nature of the disqualification imposed by the 1918 statute. H. Rep. 910, Senate Rep. 923, 71st Cong., 2d Sess. The 1931 Act was codified as 8 U. S. C. 366a.

In the meantime, in Section 28 (c) of the Immigration Act of 1924 (43 Stat. 153, 168; 8 U. S. C. 224 (c)), Congress defined the term "ineligible to citizenship" for the purposes of that statute as including any alien ineligible for citizenship under Section 2 of the Selective Draft Act of 1917, as amended.[3]

[3] Under Section 13 (c) of the Immigration Act of 1924 (8 U. S. C. 213 (c)), such aliens were excluded from the United States.

It was not until 1940, that the Congress, in Section 504 of the Nationality Act (54 Stat. 1137, 1172, 8 U. S. C. 904) specifically repealed the proviso in Section 2 of the Selective Draft Act of 1917, as amended, together with the limiting act of 1931. It was only on the basis of this specific repeal that the Immigration and Naturalization Service, in Interpretation No. 1 cited in the amicus brief (p. 17), concluded that Congress had removed in 1940 the bar to citizenship incurred during World War I by neutral aliens claiming exemption from military service. In 1945, Congress apparently confirmed this conclusion by amending (Act of October 29, 1945, 59 Stat. 551) the definition of the phrase "ineligible to citizenship" in Section 28 (c) of the Immigration Act of 1924 to eliminate the reference to neutral aliens who had claimed exemption from military service under the Selective Draft Act of 1917. It should be noted, however, that the lower courts have been divided as to whether even the 1940 repealer terminated the disqualification. *Petition of Otness,* 49 F. Supp. 220 (N. D. Cal.) holding the disqualification to be removed; *contra, In re Urmeneta,* 42 F. Supp. 138 (E. D. Wis.) and *In re Samowich,* 70 F. Supp. 273 (S. D. Wash.). The significant thing is that the Congress considered that the ineligibility for citizenship imposed by the Selective Draft Act survived the expiration of that statute and continued until specifically terminated by the Congress.

We can find no evidence of any contrary purpose in the history of the Selective Training and Service Act of 1940. Section 16 (b) of the 1940 Act originally declared that the Act was to become inoperative May 15, 1945. But there is not even the slightest evidence that by setting this time limitation Congress wished to expunge a disqualification which had previously been incurred. On the contrary, it seems evident that Congress looked to the future and that it sought to chart a terminal point beyond which the selective service machinery would no longer be needed. This expectation proved premature and, on May 9, 1945, the expiration date was moved back one year. 59 Stat. 166. Another short extension, Act of May 19, 1946, 60 Stat. 181, was followed by the last amendment on June 29, 1946, 60 Stat. 341, 342, Section 7, which set the expiration date at March 31, 1947.[4] It is on this last extension that respondent relies. But we believe that he has overlooked the purpose Congress sought to fulfill in prescribing and extending this expiration date. In our opinion, the language and design of the Selective Training and Service Act of 1940 furnish no support for an assumption that Congress wished to end the ineligibility for citizenship benefits which it had es-

[4] Although the statute was allowed to expire on that date, the absence of selective service legislation endured only for a brief period. The following year witnessed the enactment of a new Selective Service Act of 1948, containing many similar provisions.

tablished as a concomitant of exempting neutral aliens from military service.

An important element in arriving at an evaluation of the Congressional design is found in 1 U. S. C., Supp. III, 109 (formerly R. S. 13 and 1 U. S. C. 29), which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the temporary statute shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. [Emphasis supplied.]

In the light of this enactment, it is irrelevant to refer to a supposedly contrary common-law rule. For any such rule has been superseded since 1871 by this specific legislation, which must be regarded as a general saving clause to be read into all repealing statutes. *Hertz* v. *Woodman,* 218 U. S. 205, 218; *Great Northern Ry. Co.* v. *United*

States, 208 U. S. 452, 465. Even when the repealing statute itself has a specific saving clause, the provisions of 1 U. S. C. 109 cannot be disregarded. Both saving clauses must be read and applied together, and the general clause of Section 109 will yield to the later specific clause only in the event of inconsistency. *Ibid.* Here there is no inconsistency between 1 U. S. C. 109 and the provisions of Section 16 (b) of STSA, as amended. Since there is no specific legislative directive ending the ineligibility of neutral aliens who claimed exemption from military service, their disability survived repeal of the statute. See *United States* v. *Carter,* 171 F. 2d 530 (C. A. 5).

We cannot agree with the contention in the amicus brief that the reservation in 1 U. S. C. 109 of "penalties, forfeitures, and liabilities" did not encompass the disability which had attached to respondent. On the contrary it seems to us that this clearly was the type of penalty, forfeiture, or liability that Congress wished to preserve. *United States* v. *Reisinger,* 128 U. S. 398, merely rejected an assertion that this language did not reach criminal penalties. Later cases have affirmed the converse—that this saving clause does operate to continue civil liabilities and disabilities not expressly terminated. *Hertz* v. *Woodman, supra; United States* v. *Carter, supra.*

Finally, on October 29, 1945, the Congress incorporated the disqualification for citizenship im-

posed by Section 3 (a) of the Selective Training and Service Act of 1940 into the definition of "ineligible to citizenship" in Section 28 (c) of the basic Immigration Act of 1924 (59 Stat. 551, 8 U. S. C. 224 (c)). This action was inconsistent with any assumption that Congress regarded the disqualification as merely temporary. To the contrary, by incorporating it into permanent law after the fighting was over and when the Selective Training and Service Act was about to expire, Congress was treating it as a continuing disqualification like the similar bar imposed by the 1917 Act. It was in this Congressional action in 1945 that the Court of Appeals for the Second Circuit found an intent to continue the disqualification for citizenship in Section 3 (a) beyond the repeal of the 1940 Act. *Benziaw* v. *Godwin*, 168 F. 2d 952, 945.

2. *The status of Denmark during World War II:* The respondent now asserts that Denmark was not a neutral country during World War II, and that his exemption from military service as a neutral Danish citizen must be regarded as a nullity leaving him eligible for American citizenship (Resp. br. pp. 46–58). In the first place, we believe that he should not now be allowed to disavow his claimed status as a neutral alien in which he enjoyed complete exemption from military service during World War II. Furthermore, the respondent never presented this contention to the Selective Service System or to the Im-

migration and Naturalization Service in connection with his application for suspension of deportation. In any event, we believe that the contention is frivolous.

As we pointed out in our main brief, the determination of neutrality is a political question to be resolved by the President or by the agency designated by him (Pet. br. p. 64). The respondent seeks to avoid the force of this principle by asserting that the Director of Selective Service in classifying Denmark as a neutral country was acting at odds with the President and the Department of State. The situation of Denmark during World War II was unusual, and the United States and its military allies treated Denmark differently for different purposes. The listing of neutral countries for Selective Service purposes in Local Board Memorandum No. 112 was prepared, and from time to time amended, only after consultation and agreement with the Department of State. Contrary to the respondent's suggestion, there was no clash of policies between "subordinate" agencies, but rather a single, flexible national policy under the direction of the President. Indeed, the complicated situation with respect to Denmark would seem to be a perfect example of the reasons why the courts leave the determination of such questions to the political agencies of the Government.

3. *The respondent's Selective Service classification.* It is undisputed that the respondent

claimed exemption from military service as a neutral alien on Form DSS 301, and that he obtained and enjoyed exemption from military service. However, the respondent reiterates that in fact he was classified as 1–A, i. e., available for military service, until September 21, 1945 (R. 4; resp. br. p. 4). However, the official files of the Selective Service System show that the respondent was placed in Class 4–C, i. e., neutral aliens claiming exemption as such, on March 27, 1942, and that he was so notified on April 8, 1942.

Respectfully submitted.

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v.

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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May, 1950.

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Supreme Court of the United States

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v.

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 17-29) is now reported at 179 F. (2d) 796. The District Court wrote no opinion (R. 12).

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1949 (R. 29). By order of the Chief Justice, dated March 17, 1950, the time for filing a petition

for a writ of certiorari was extended to and including March 27, 1950 (R. 32). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, when the Attorney General refuses to suspend deportation solely because of erroneous construction of a statute, and habeas corpus is unavailable to the applicant for suspension because he is not in custody, he may, after exhausting all administrative remedies, obtain a correct construction of the statute in a declaratory judgment proceeding.*

2. Whether it was correctly decided that an alien admitted as a temporary visitor who at all relevant times was under a warrant of deportation was not "residing in the United States" and therefore was not liable to military service under Section 3(a) of the Selective Training and Service Act of 1940, as amended (hereinafter abbreviated STSA).

STATUTES INVOLVED

In addition to the statutes summarized by petitioners (Pet. 2-5), attention is called to the Immigration Act of 1917, Sec. 25, 39 Stat. 893, 8 U. S. C. A. 164, which provides:

* Petitioners state the procedural question as two questions, one referring to the Administrative Procedure Act, the other to a declaratory judgment proceeding (Pet. 2). Neither of petitioners' statements is correct, for each assumes that respondent was free to bring habeas corpus—that his suit was "in lieu of a proceeding in habeas corpus" (Pet. 2). Actually, respondent was not in custody and habeas corpus was not available (R. 6, 18), as is clear from the opinion below (R. 18, 22).

> The district courts of the United States are invested with full jurisdiction of all causes, civil and criminal, arising under any of the provisions of this chapter.

In connection with Section 19(c) of the Immigration Act of 1917, 54 Stat. 672, 8 U. S. C. A. 155(c), summarized by petitioners (Pet. 3), it should be noted that the Attorney General has authority to suspend deportation of an alien who proves good moral character for the preceding five years and who is not ineligible to naturalization if the Attorney General finds "that such deportation would result in serious economic detriment to a citizen * * * who is the spouse, parent, or minor child of such deportable alien".

SUPPLEMENTAL STATEMENT

Certain omissions and inaccuracies in petitioners' Statement (Pet. 5-9) necessitate this Supplemental Statement.

Respondent's complaint was brought under the Immigration Act as well as under the Declaratory Judgment Act and Administrative Procedure Act (R. 2).

Petitioners' statement that respondent "has continued to reside in the United States" since he was ordered deported to Denmark on May 15, 1941 (Pet. 6), assumes, contrary to the fact and to the decision of the court below, the very substantive issue involved in this case. The correct statement in this regard is that respondent since his entry into the United States continuously has remained therein (R. 3).

Respondent's acceptance of employment in the United States while a temporary visitor was necessitated by the fact that the outbreak of World War II prevented his departure from this country and consequently he had to earn a living here (R. 3). Respondent's wife, a native-born citizen of the United States, is wholly dependent upon respondent for support (R. 4). The Board of Immigra-

tion Appeals for the Attorney General has concluded all issues in respondent's favor, including the facts that he has been a person of good moral character for the past five years and that his deportation would cause an economic detriment to his United States citizen wife, except that it has not found that respondent is eligible to naturalization in the United States (R. 4-5). Deportation of respondent would be suspended if the Board were of the opinion that he is eligible to naturalization in the United States (R. 5). Refusal to suspend deportation is predicated exclusively upon the conclusion that respondent is not eligible to naturalization in the United States, which conclusion in turn is predicated exclusively on the Board's construction of STSA, Sec. 3(a) (R. 5).

The warrant of deportation issued against respondent on May 15, 1941 was withdrawn on June 10, 1946 (R. 4). Respondent was not in custody at the time he brought suit on December 6, 1947 nor is he today (R. 2, 6, 18). Respondent has not been under a warrant of deportation since June 10, 1946, but is under an order of petitioners to "depart voluntarily" from the United States in lieu of deportation (R. 4, 22).

The most concise yet accurate statement of the facts appears in the opinion of the court below (R. 17-18).

ARGUMENT

The decision below is clearly correct on both the procedural and substantive questions. There is no conflict between courts of appeals on either question. As to the procedural question, the decision below accords with all of the circuit courts of appeals cases in point, and a controlling decision of this Court. The decision on the substantive question is dependent on unique facts and is not of general importance. Neither question merits further review.

I. The Procedural Question

1. Petitioners in Questions Presented (Pet. 2) and in Reasons for Granting the Writ (Pet. commencing at 9), erroneously assume that the procedural question is whether a deportation order can be reviewed in a proceeding under the Declaratory Judgment Act or Administrative Procedure Act, in lieu of a proceeding in habeas corpus. That is not the precise question. Respondent is not under a deportation order and has not been since the order was withdrawn on June 10, 1946 (R. 4).

Respondent duly applied for suspension of deportation (R. 4). The Board, acting for the Attorney General, denied the application solely on the basis of its construction of STSA, Sec. 3(a) (R. 5). The consequence of such denial was that respondent was ordered to effect his "voluntary departure" from the United States (R. 4). After exhausting all administrative remedies (R. 6, 18), respondent brought his declaratory judgment action to obtain what he contends is a correct construction of the statute (R. 2, 7). As stated by the court below, respondent "was not in custody at the time he brought suit, nor is he today" (R. 6, 18). He is not under a warrant of deportation and has not been since June 10, 1946 (R. 4). Therefore habeas corpus was not and is not available.

Habeas corpus would be available only if respondent violated petitioners' order to him to effect his departure and subsequently was subjected to a deportation warrant after being taken into custody.

The procedural question therefore is whether an applicant for suspension of deportation whose application is denied and who is required to depart solely because of an erroneous administrative construction of a statute, may obtain in a declaratory judgment action a correct construction, habeas corpus being unavailable. It is submitted that the answer of the court below is clearly correct. As stated by that court, "To compel him (respondent) to go

into custody before he can have his rights determined would be to defer to formalism and order the performance of a useless act, an act which may require him to sacrifice his possessions in preparation for leaving the country." (R. 22). This conclusion already has had the approval without dissent of this Court which upheld the granting of declaratory relief in *Perkins* v. *Elg*, 307 U. S. 325, where the trial court said:

> "According to the allegations of the bill, the Department of Labor has notified the plaintiff that she is illegally within the United States and has required her to leave the United States and in case of her not going, she would be deported as an alien. *Her only recourse would be to submit to arrest and then seek the issuance of a writ of habeas corpus. I think that this belongs to a class of cases for which a declaratory judgment is eminently suited.*" (*Perkins* v. *Elg*, D. C. Equity 63, 408, italics added.)

The substantiality of the distinction between the instant procedural question, and the question assumed by petitioners to be presented, has been recognized at this term by the Solicitor General in his brief opposing certiorari in *Kaminer* v. *Clark*, No. 346:

> "Since petitioner is now confined in the Southern District of New York, it is plain that the United States District Court for the District of Columbia derives no power from the Declaratory Judgment Act, which is procedural only, to effect his release indirectly by a declaration of rights. In other words, if that court has no power to inquire into the alleged restraint of petitioner's liberty, it has no power to effect his release under any form of procedure. * * * *Perkins* v. *Elg*, 99 F. 2d 408 (C. A. D. C.), modified, 307 U. S. 325, and *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3), on which petitioner relies (Pet. 7-8, 9-10, 13), are plainly distinguishable from the case at bar. *In those cases, the complainants were not in custody* (see 99 F. 2d at pages 413-414 and 166 F. 2d at page 459), and neither of the courts in those cases was called upon to make an inquiry into the

cause of a restraint of liberty. (Pp. 8-9, italics added).

2. In any event, it is now clear that habeas corpus is no longer the exclusive judicial remedy for correction of errors of statutory construction made in deportation proceedings. The cases cited by petitioners which were decided before enactment of the Declaratory Judgment Act and the Administrative Procedure Act (Pet. 11-12) no longer control. Necessity for further discussion of this point is obviated by the exhaustive and authoritative nature of the opinion below, and in the interest of brevity that opinion is referred to as dispositive of this issue (R. 18-23).

In addition it should be noted that Rule 57, Federal Rules of Civil Procedure, not mentioned in the Petition, provides in part:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

3. The cases decided by circuit courts of appeals unanimously hold that a person is entitled to a declaratory judgment under the Administrative Procedure Act in circumstances such as exist here. Besides the case at bar, these cases are *Trinler* v. *Carusi*, 166 F. (2d) 457, 168 F. (2d) 1014 (C. A. 3rd, 1948), and *Podovinnikoff* v. *Miller*, 179 F. (2d) 937 (C. A. 3rd, 1950). The unanimity of the courts of appeals substantially has its counterpart in the thinking of other courts and the profession generally, *Eisler* v. *Clark*, 77 F. Supp. 610 (D. C. D. C., 1948), cert. den. 338, U. S. 879; *Cammarata* v. *Miller*, 79 F. Supp. 643 (D. C. N. Y., 1948); 61 Harv. L. Rev. 1445 (1948); 49 Col. L. Rev. 73, 80-81 (1949). Indeed as suggested by the court below (R. 18-19), the right to a declaratory judgment in deportation proceedings under the instant circumstances exists independently of the Administrative Procedure Act. *Perkins* v. *Elg*, 307 U. S. 325. The decision of the court below is thus accordant with all of the

circuit courts of appeals cases in point, the thinking of the profession, and the controlling decision of this Court.

4. Awarding declaratory relief here in no way involves improper interference with administrative discretion. The substantive question is a naked, isolated question of law—has the Attorney General misconstrued a statute? The correct answer to that question is indispensable to lawful exercise of discretion.

Petitioners' intimations that the administrative process is not complete (Pet. 24), are afterthought. No such contention has been made heretofore. The complaint alleges exhaustion of administrative remedies (R. 6). Indeed, respondent went beyond the requirement of such exhaustion for, after final action of the Board, he duly petitioned the Attorney General for review (R. 4). As stated by the court below (R. 22):

> "That this is a case ripe for judicial cognizance is not seriously challenged by the appellees (petitioners)."

5. Petitioners' argument that the decision below might unduly burden District of Columbia courts (Pet. 21-22), puts the cart before the horse and is logically irrelevant, for if such courts have jurisdiction, they must perform their duty when jurisdiction is properly invoked, however burdensome the duty. But the argument is as unrealistic as it is irrelevant. A very small percentage of the deportation proceedings conducted by petitioners (Pet. 21) reach the courts in any form.

Petitioners' observation that declaratory proceedings can be abused (Pet. 22) is also true of habeas corpus. If it is conceivable that a habeas corpus proceeding might follow a declaratory proceeding, thus duplicating litigation (Pet. 22), it is a fact of history that habeas corpus proceedings have the habit of reappearing. The point is that the district courts can protect themselves against all frivolous and dilatory proceedings, in whatever form. And

under Rule 57, Federal Rules of Civil Procedure, declaratory proceedings may be expedited, no less than habeas corpus.

But whatever burden entertainment of declaratory proceedings might impose on the courts if available as an alternative to habeas corpus to review final deportation orders, that problem is irrelevant here because a deportation order is not involved. Likely petitioners' speculative fears arise in part at least from their confusion of the procedural problem actually involved here—judicial review for one not in custody and for whom habeas corpus is not available—with the more inclusive problem erroneously posed in petitioners' Questions Presented (Pet. 2). The precise procedural problem here presented arises under unique facts not likely to recur often. In any event the problem will recur only with a person of excellent moral character, like respondent, in respect to whom every dictate of efficient administration, common sense and humanity requires exemption from custody pending determination of a purely legal question.

Lastly, if petitioners' speculative fears materialize and declaratory suits in deportation cases prove unduly burdensome to District of Columbia courts, a relatively simple legislative change would enable such suits to be brought in other districts against the local official of the Immigration and Naturalization Service. In fact, it has been technical objections by petitioners, which could have been waived in the form of consents to venue or voluntary appearances, which have caused deportation cases to be litigated here rather than elsewhere. See *Stamatiou* v. *Miller*, 88 F. Supp. 556 (D. C. Pa., 1949); *Connor* v. *Miller*, 178 F. (2d) 755 (C. A. 2nd, 1949).

The procedural question was correctly decided by the court below consistently with all of the decided courts of appeals cases and the controlling decision of this Court, and merits no further review.

II. The Substantive Question

The decision below is also clearly right on the substantive question, is dependent on the unique instant facts and is not of general importance, and therefore merits no further review.

Respondent came to the United States in August, 1939, as a temporary visitor. Unable because of war conditions to return to Denmark, he had to accept employment in this country or starve. His acceptance of employment, a violation of his temporary visitor's status, resulted in the issuance of a warrant of deportation against him on May 15, 1941. From that time on, until the warrant was withdrawn on June 10, 1946, he was subject continuously to that warrant, the execution of which was in abeyance only because such execution was rendered physically impossible by war conditions (R. 3-4). Thus, during the entire period when in the theory of petitioners respondent was subject to STSA, Sec. 3(a), respondent did not have in this country even the status of a temporary visitor or sojourner; his presence here was with the express disapproval of the sovereign; he was actually under a warrant of deportation.

Under these circumstances it is clear that respondent was not "residing in the United States" and was not subject to STSA, Sec. 3(a). Abundant precedents of international law, our own immigration and naturalization laws, and judicial decisions defining "residing" in the varying and multiple situations in which it has legal significance (R. 23-29), as well as decisions defining it specifically for purposes of World War II military service—e.g., *Ex parte Asit Ranjaw Ghosh*, 58 F. Supp. 851, 854 (D. C. Cal., 1944), appeal dismissed, 148 F. (2d) 822 (C. A. 9th, 1945); *Ex parte Fillibertie*, 62 F. Supp. 744, 747-48 (D. C. N. Y., 1945)—make this conclusion inevitable. To stretch "residing in the United States" to include one like respondent whose temporary visit had culminated in

a warrant of deportation and who remained subject to such warrant at all relevant times, would be to abandon both reason and history. This is demonstrated so comprehensively and authoritatively in the opinion of the court below (R. 23-29) that further discussion is unnecessary and in the interest of brevity reference is made to such opinion.**

Petitioners, although conceding "some factual deviations" between this case and *Benzian* v. *Godwin*, 168 F. (2d) 952 (C. A. 2nd, 1948), cert. denied 335 U. S. 886, argue that the decision below is irreconcilably opposed to that of the Court of Appeals for the Second Circuit in the *Benzian* case (Pet. 26). But the "factual deviations" wholly differentiate the cases. Benzian was not under a warrant of deportation (R. 26) as was respondent (R. 4). Moreover, Benzian, a citizen of Sweden (168 F. (2d) at 953) was clearly a "citizen or subject of a neutral country" within the meaning of STSA, Sec. 3(a), whereas respondent, a Danish subject (R. 3), was not.**

And, in any event, the *Benzian* case had abated prior to its decision by the court of appeals because the Selective Service Board, as members of which defendants were sued, had passed out of existence. It was on this basis that the Solicitor General moved to dismiss the petition for

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** An alternative basis for the conclusion that respondent was never subject to STSA, Sec. 3(a), which the court below mentioned but did not consider necessary to pass upon (R. 23-24, n. 6), is that respondent, a Danish subject (R. 3) was not the subject of a neutral nation within the meaning of STSA, Sec. 3(a). *Petition of Ajlouny*, 77 F. Supp. 327 (D. C. Mich., 1948). Judicial notice will be taken that Denmark was invaded by Germany on April 9, 1940, months before the enactment of STSA on September 16, 1940. This Government appears to have recognized the belligerency of Denmark from April 9, 1940. Military Government Law No. 3, Office of Military Government for Germany (U. S.), Title 23, enacted November 15, 1944, includes Denmark in the list of " * * * nations which are signatories of the United Nations Declaration dated January 1, 1942 and nations associated with them in this war * * *".

certiorari in the *Benzian* case.*** An abated cause can present no conflict, for it is not a binding precedent. *Leader* v. *Apex Hosiery Co.*, 108 F. (2d) 71, 81 (C. A. 3rd, 1939), affirmed, 310 U. S. 469.

CONCLUSION

The judgment below is clearly correct both on the procedural and the substantive questions and there is no conflict of decisions of circuit courts of appeals. To the extent that the case, in its procedural aspect, is of general importance, it is controlled by a decision of this Court and is in harmony with all courts of appeals cases in point. The opinion below is unanimous, exhaustive and authoritative. No question is presented which merits further review by this Court. It is, therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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May, 1950.

*** *Benzian* v. *Godwin*, No. 317, October Term, 1948, Motion of Solicitor General to Dismiss the Petition for a Writ of Certiorari and Memorandum in Support Thereof.

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Supreme Court of the United States

October Term, 1950

No. 34

J. HOWARD MCGRATH, Attorney General of the United States, ET AL., *Petitioners*

v.

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT

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Supreme Court of the United States

October Term, 1950

No. 34

J. Howard McGrath,[1] Attorney General of the United States, et al., *Petitioners*

v.

Peder Kristian Kristensen, also known as Peter Kristen Kristiansen, also known as Peter Christensen

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 13)[2] is reported at 179 F. 2d 796. The District Court wrote no opinion (see R. 9).

---

[1] When this action was commenced, the Honorable Tom Clark, Attorney General of the United States, and Laurence P. Sherfy, one of the five members of the Board of Immigration Appeals, were among the seven defendants named (R. 1). By appropriate orders of the Court of Appeals, September 28, 1949 (R. 12-13), and the District Court, October 22, 1948, their successors, the Honorable J. Howard McGrath, Attorney General of the United States, and Louisa Wilson, member of the Board of Immigration Appeals, were substituted as defendants.

[2] All references to the Transcript of Record are to the record as printed in this Court, i. e., to the upper numerals on pages containing double pagination.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1949 (R. 25). By order of the Chief Justice, dated March 17, 1950, the time for filing a petition for certiorari was extended to and including March 27, 1950 (R. 28). Petition for a writ of certiorari was filed March 24, 1950, and was granted May 15, 1950 (R. 29). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED

1. Whether, when the Attorney General refuses to suspend deportation solely because of his erroneous interpretation of a statute, and habeas corpus is unavailable to the applicant for suspension because he is not in custody, he may, after exhausting all administrative remedies, obtain a correct interpretation of the statute in a declaratory judgment proceeding.

2. Whether it was correctly decided that an alien admitted as a temporary visitor who at all relevant times was under a warrant of deportation was not "residing in the United States" and therefore was not liable to military service under Section 3(a) of the Selective Training and Service Act of 1940, as amended (hereinafter abbreviated STSA).

3. Whether Denmark was a non-neutral country during the times involved, so that the application of a Danish subject for relief from United States military service did not bar him from United States citizenship under STSA, Section 3(a).[3]

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[3] For the first time, as they admit (Pet. Br. 13), petitioners raise the question whether the case at bar is a justiciable "case or controversy". They state the question thus: "Whether the Attorney General's refusal to suspend deportation of an alien under

STATUTES INVOLVED

In addition to the statutes summarized by petitioners (Pet. Br. 2-6), attention is called to the Immigration Act of 1917, Sec. 25, 39 Stat. 893, 8 U. S. C. A. §164, which provides:

> "The district courts of the United States are invested with full jurisdiction of all causes, civil and criminal, arising under any of the provisions of this chapter."

In connection with the Administrative Procedure Act (hereinafter referred to as the A. P. A.), 60 Stat. 242, 243, 5 U. S. C. A. §1001, ff., from which petitioners have quoted only a portion of Section 10 (Pet. Br. 4-5), it should be noted that Section 9 of the A. P. A. provides:

> "In the exercise of any power or authority—
> (a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

SUPPLEMENTAL STATEMENT

The following facts are omitted from petitioners' Statement. (Pet. Br. 6-10):

Section 19(c) of the Immigration Act of 1917 presents a justiciable question, where his suspension of deportation must be affirmatively approved by a concurrent resolution of the Congress." (Pet. Br. 2). By so phrasing the question, they imply that the Attorney General's action is still completely *in fieri* unless and until it is approved by the Congress. The fact is that the Attorney General has power, wholly apart from any further action of Congress, to suspend deportation until the end of the succeeding session of Congress. It is to obtain the exercise of his discretion on a legal basis that respondent has prosecuted this action. Petitioners' new "question" is wholly insubstantial, as is established by petitioners' own argument, and in the interest of brevity, respondent will consider it briefly in the Argument before dealing with the questions presented to the court below and here separately stated.

Respondent's complaint was brought under the Immigration Act of 1917 as well as under the Declaratory Judgment Act, 48 Stat. 955, 28 U. S. C. A. Sections 2201-2202, and the A. P. A. (R. 1-2).

Respondent's acceptance of employment in the United States while a temporary visitor was necessitated by the fact that the outbreak of World War II prevented his departure from this country and consequently he had to earn a living here (R. 2). Respondent's wife, a native-born citizen of the United States, is wholly dependent upon respondent for support (R. 3).

In connection with petitioners' statement that respondent's "request for exemption was honored, and he never was called upon to perform military service for the United States" (Pet. Br. 8), it should be noted that respondent's Selective Service Board sent him, without his request, Form DSS 301 (R. 4), and that after respondent executed and filed such form under the circumstances detailed by petitioners (Pet. Br. 7-8), his Selective Service Board informed him that he had been placed in Classification 1-A and ordered him to report for induction. Respondent did so, but was thereupon advised by the authorities in charge that he was released and should go home because he had filed Form DSS 301. Respondent remained in Classification 1-A from about April 30, 1942, until September 21, 1945 (R. 4).

SUMMARY OF ARGUMENT

Respondent first disposes of petitioners' new contention that the case is not justiciable, as insubstantial. He then argues the questions presented to the court below:

I

The Immigration Act's provision that the decision of the Attorney General "shall be final" in deportation mat-

ters, while rigidly limiting the scope of judicial review to questions of law, does not wholly preclude judicial review. The historic availability of habeas corpus in deportation cases proves this. Moreover, since the enactment in 1934 of the Declaratory Judgment Act, questions of law arising in deportation cases may be reviewed in declaratory judgment actions after exhaustion of administrative remedies. *Perkins v. Elg*, 307 U. S. 325 (1939). The effect of the A. P. A. is expressly to approve application of the doctrine of *Perkins v. Elg* in cases such as this. Section 10(b) of the A. P. A. provides that one "form of proceeding for judicial review" shall be "actions for declaratory judgments". Nothing in the introductory clause of Section 10 of the Act cuts down on the effectiveness of Section 10(b), for no statute "precludes judicial review" of the narrow type here invoked, and agency action in interpreting a law is not committed to agency discretion. The legislative history of the A. P. A. makes it abundantly clear that it was the Congressional intent to do what Section 10(b) on its face does, namely, make a declaratory judgment action an alternative remedy to habeas corpus under facts such as here exist.

Moreover, declaratory relief is wholly appropriate and reasonable here. Habeas corpus is presently unavailable, and there is no justification for requiring respondent to be taken into custody, with all the burdens that involves, before he can obtain judicial interpretation of a controlling statute. Under the instant facts declaratory relief is expeditious, convenient and accordant with modern concepts of business-like adjudication. Moreover, even assuming that habeas corpus were available, Rule 57 of the Federal Rules of Civil Procedure provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

II

Section 3(a) of STSA, requiring military service from every male person "residing in the United States" had no application to respondent and in no way subjected him to the requirement of military service for the reason that he was not a person "residing in the United States". Respondent came here as a temporary visitor in August, 1939. War conditions compelled him to remain here. He therefore had to earn a living here and accepted employment. This was a violation of his temporary visitor's status, and on May 15, 1941, a warrant of deportation issued against respondent because he had accepted employment. This warrant remained in effect until June 10, 1946. Thus it was in effect at all relevant times, commencing at a date almost a year before respondent's Selective Service Board on March 26, 1942, sent him Form DSS 301 and informed him that because the warrant of deportation was extant, the most appropriate thing for him to do was to execute the form. The sole reason that respondent remained in the United States after May 15, 1941, was the physical impossibility, caused by the war, of actually deporting him. The words "residing in the United States" as used in Section 3(a) exclude a temporary visitor and even more clearly exclude a person such as respondent under a warrant of deportation whose expulsion awaited only the physical opportunity of executing it. This conclusively appears from the meaning of "residence" in international law and under numerous United States statutes and decisions. There is not one word in the legislative history of Section 3(a) indicating a departure by Congress from the well-settled meaning of the words "residing in the United States". Section 3(a) had no application to respondent, and the filing of Form DSS 301 was a nullity.

III

Section 3(a)'s provision for debarment from citizenship is inapplicable to respondent for the additional reason that Denmark was not a "neutral country" within the meaning of that section. While the precise status of Denmark at any given time from the date of German occupation on April 9, 1940, to 1945 presents difficult questions, the one clear thing is that she was not neutral. This was the view of our State Department and President. The *ex parte* determination of the Director of Selective Service that Danish subjects were to be treated as subjects of a neutral country for STSA purposes, cannot prevail, on a question so fraught with international implications as is that of a nation's neutrality, against the viewpoint of the organ of our Government which is its voice in foreign affairs. In any event, even attributing to the Director's determination its maximum possible significance, the result is that we have a situation of diverse executive viewpoints on the question of Denmark's neutrality. Under these circumstances, there is nothing in the "political questions" doctrine to preclude a court from adhering to the most authoritative voice, and refusing to look to a contrary decision of a subordinate agency. Indeed, a court is bound so to adhere, especially when the subordinate's opinion has no support in the facts. The conclusion that Denmark was "neutral" has no support in the facts.

ARGUMENT

Preliminary Considerations

There is no merit to the contention now advanced by petitioners for the first time, after almost three years of litigation, that the case at bar does not present a justiciable controversy (Pet. Br. 13-20).

At another stage in their argument, petitioners cite nine recent decisions of the Courts of Appeals of three

different circuits which they say hold that, "In habeas corpus proceedings, an alien facing deportation can raise every question that he would be entitled to raise in an action such as the present one." (Pet. Br. 56, at n. 22). Obviously if, as petitioners argue, an order denying suspension of deportation presents no case or controversy in a declaratory judgment action, it presents none in habeas corpus. The matter presented by the two proceedings is identical, namely: Was suspension of deportation denied because of error of law? Yet, as petitioners have shown us, the Courts of Appeals of four circuits (two courts on habeas corpus, the court below in a declaratory judgment action, and one court in both habeas corpus and declaratory judgment proceedings) have failed to intimate even a doubt that this type of case is justiciable. We submit that the reason is that the newly-found contention is insubstantial.

For purposes of considering this contention, Section 19(c) of the Immigration Act may be summarized as follows:

1. If after the judgment in this case has brought about the exercise of the power of suspension on a lawful basis, the Attorney General suspends the deportation of respondent for a period longer than six months, he is required by the statute to report the case to Congress.

2. If Congress, prior to the end of the succeeding session, passes a concurrent resolution favoring the suspension of deportation, the deportation proceedings must be cancelled; if such a concurrent resolution is not passed by the end of said succeeding session, respondent must be deported as provided by law.

In respect of these provisions, petitioners state: "It is clear, therefore, that when the Attorney General acts favorably upon an application for suspension of deportation

pursuant to Section 19(c), he is in effect making a recommendation to the Congress." (Pet. Br. 14).[4]

Whether or not the effect of the suspension of deportation by the Attorney General is a "recommendation" as to the ultimate status of the alien, it is clear that *the suspension does have a positive legal effect in that it terminates the deportability and fixes the alien's status at least for the period until Congress acts favorably or until the end of the following session of Congress, without further action by Congress or any other agency.*

Petitioners rely upon the dicta contained in *Hayburn's* case, 2 Dall. 409 (1792), *United States v. Ferreira*, 13 How. 40 (1851), and *Gordon v. United States*, 117 U. S. 697 (1864),[5] to the effect that "when the decision of the court was subject to the revision of a Secretary *and Congress*, it was not the exercise of a judicial power, and could not therefore be executed by the court."[6] (117 U. S. 703,

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[4] But the question is not, as petitioners assume, whether justiciability would exist had the Attorney General suspended deportation. It is his refusal to do so—solely because of his mistaken interpretation of a statute as we hereinafter show—that prevents respondent's case from being reported for Congressional consideration.

[5] It will be noted that in these cases, it was the conclusions of the courts that were directly subject to administrative or Congressional reversal; here, Congress would in no event act upon the declaratory judgment as such, but only on the Attorney General's suspension order.

[6] There is no serious contention made by petitioners that the discretion vested in the Attorney General in connection with suspension of deportation deprives the case of its justiciability (see Pet. Br. 15, n. 2). Indeed there could not be, for, as this Court

quoted with emphasis added in Pet. Br. 17). Petitioners would bring the instant case within the scope of such dicta, on the assumption that the court's act herein, as in the cases relied upon, will be *completely ineffective* unless and until Congress acts. But precisely the contrary is true.

It will also be noted that the dicta petitioners cite are from cases decided prior to 1865. Indeed, the statements of Chief Justice Taney, in *Gordon v. United States*, 117 U. S. 697 (1864), never were adopted by this Court. The opinion reported at 117 U. S. 697 was left by Chief Justice Taney at his death October 12, 1864, and was not adopted as the opinion of the Court, nor was it even published until some twenty years later. The *decision* in *Gordon's* case was rendered, after reargument, on March 10, 1865. 2 Wall. 561-562. In *United States v. Jones*, 119 U. S. 477 (1886), it was held that the reason for which the Court found that *Gordon's* case did not present a "case or controversy" was that the judgment of the Court of Claims was subject to the revision of the head of the executive department, and not at all that Congress might fail or refuse to make an appropriation and thus frustrate the judicial decision. In the *Jones* case, it was held that the change of the statute by which the executive officer was deprived of his power of revision made the controversy justiciable, even though the duty of the Secretary of the Treasury was only to pay out of " 'any general appropriation made by law for the payment and satisfaction of

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stated in characterizing the decision in *Perkins v. Elg*, 307 U. S. 325, 349 (1939):

> "Even in some discretionary matters it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction." *Arenes v. United States*, 322 U. S. 419, 432 (1944).

private claims, on presentation' to him 'of a copy of said judgment, certified' according to law. * * *"

In *Pocono Pines Assembly Hotels Co. v. United States*, 73 C. Cls. 447 (1932), mandamus and prohibition denied 285 U. S. 526, the subject was reviewed in an exhaustive opinion. There it was said that *United States v. Jones*, 119 U. S. 477 (1886), "renders the *Gordon* case of no value as a precedent so far as the jurisdiction of this court is concerned". The opinion of the Court of Claims went on to point out that all judgments, even those of the Supreme Court, in which the United States is a defendant to a money claim, are dependent upon the appropriation of funds by Congress before they can become effective (Art. I, Sec. 9, U. S. Constitution) and yet, since the *decision* in *Gordon v. United States, supra*, there had been no doubt that such cases present justiciable controversies. 73 C. Cls. 497.

Of course, it is the nature of the Congressional power that Congress, by action or inaction, may expand or contract the effect of decisions previously made by administrators or courts. Cf. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 423-424 (1946). Indeed, the Declaratory Judgment Act itself would seem to represent such Congressional action. Compare *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 289 (1928), with *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227 (1937). Whether or not Congress might choose to enlarge the duration of the suspension of deportation beyond the period ending with the conclusion of the succeeding session of Congress, it is clear that the power of the Attorney General to suspend deportation for that considerable period of time is not, under existing statutes, subject to any immediate revision by the Congress or any other agency. Of course, it is conceivable that Congress might terminate all suspensions of deportation and thus vitiate all prior decisions of the Attorney General. The existence of such Congressional

power permeates nearly all matters which come before courts, and yet no serious representation has ever been made that by reason of its existence the decisions of courts are denied judicial character.[7]

Petitioners' contention of lack of justiciability is insubstantial. We therefore turn to the the issues presented below, and stated in respondent's Questions Presented.

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[7] It is suggested that the most petitioners' contention would possibly justify is dismissal of certiorari as improvidently granted, for it seems probable that jurisdiction below is in any event sustainable on the ground that the courts below functioned other than as Article III courts. That District of Columbia courts constitutionally may do so is clear, *O'Donoghue v. United States*, 289 U. S. 516, 546 (1933); *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442-443 (1923), and seems conceded (Pet. Br. 20, n. 3). We emphasize that the Declaratory Judgment Act confers on "*any* court of the United States" the power to render a declaration in appropriate cases. (The language in such cases as *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239-241 (1937), respecting the Declaratory Judgment Act's applicability only in Article III controversies, must be understood in the light of the fact that all such cases arose in Article III courts.) In 28 U. S. C. A. §451, "court of the United States" is defined as including, among others, the district courts of the United States for the districts of Hawaii and Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court. These are not Article III courts. *O'Donoghue v. United States, supra*, 535-536; *Ex parte Bakelite Corp.*, 279 U. S. 438, 452, 458-460 (1929). The A. P. A. confers power of review by declaratory judgment on "any court of competent jurisdiction.". §10(b). Consequently it seems clear that Congress was unconcerned with the theory under which the power of the reviewing court was derived. No subtle discrimination between functioning under Article III, and other functioning, was being made, for Congress was merely assuring that: "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." A. P. A., §10(c).

I

JUDICIAL REVIEW OF THE ATTORNEY GENERAL'S ERRONEOUS INTERPRETATION OF A STATUTE MAY BE HAD IN A DECLARATORY JUDGMENT ACTION AFTER EXHAUSTION OF ADMINISTRATIVE REMEDIES, WHERE SUCH INTERPRETATION ALONE PREVENTS SUSPENSION OF DEPORTATION.

A. Preliminary Analysis.

The Attorney General has found to exist all facts necessary to suspend respondent's deportation—that he has been a person of good moral character for the past five years and that his deportation would cause an economic detriment to his United States citizen wife. But he also concluded that respondent is ineligible to naturalization, and on that ground only he denied suspension of deportation. The conclusion of ineligibility is predicated solely and exclusively on the Attorney General's interpretation of STSA, Section 3(a). Respondent's substantive case is that such interpretation is erroneous. He exhausted all administrative remedies in an attempt to get what he contends is a correct interpretation (R. 3-4; Pet. Br. 22). He was not in custody at the time he brought suit, nor is he today.

The procedural question presented therefore is: When the Attorney General finds that all facts necessary for suspension of deportation exist but denies suspension solely because he misinterprets a relevant statute, may an applicant for suspension for whom habeas corpus is not available, after exhausting administrative remedies, obtain a correct interpretation of the statute in a declaratory judgment action?[8]

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[8] The decision of the Court of Appeals below accords with *United States ex rel. Trinler v. Carusi*, 166 F. 2d 457 (C. A. 3d, 1948), which held that a deportation order is judicially reviewable under

Petitioners' contention in the negative is this: The provision of Section 19(a) of the Immigration Act of 1917 that "the decision of the Attorney General shall be final" when he orders deportation, impliedly precludes judicial review. Conceding the availability of habeas corpus in deportation proceedings, petitioners argue that it alone is available and that it does not constitute "judicial review". Therefore, petitioners conclude, the A. P. A.'s general guarantee of judicial review does not avail respondent, because such general guarantee is restricted by Section 10's introductory clause, "Except so far as * * * statutes preclude judicial review."[9]

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the A. P. A. The *Trinler* case later abated on technical grounds, but was followed in *Podovinnikoff v. Miller*, 179 F. 2d 937 (C. A. 3d, 1950). The Court of Appeals for the Second Circuit has found it unnecessary to decide the issue. *Connor v. Miller*, 178 F. 2d 755 (1949); *Azzolini v. Watkins*, 172 F. 2d 897, 898 (1949). Thus both Courts of Appeals which have decided the procedural issue have been in accord with respondent's position, as has at least one District Court, *United States ex rel. Cammarata v. Miller*, 79 F. Supp. 643 (S. D. N. Y., 1948).

[9] Petitioners ignore that the House Report, referring to this clause, states: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must *upon its face* give clear and convincing evidence of an intent to withhold it." (Emphasis added; Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 275). Petitioners apparently now make no contention that the other introductory clause of the A. P. A.'s Section 10—"Except so far as * * * agency action is by law committed to agency discretion"—negates Section 10's general guarantee of review. Such a contention is disposed of in the opinion below (R. 16). An abundance of legislative history also disposes of it. In addition to the citations in the opinion below, see Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 36; pp. 310-311, 368-369. The intention to confine agencies within applicable statutory limits is also clear on the face of A. P. A., Section 9(a): "No sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law." Of course these limits include those present in STSA. Section 3(a), as well as those arising directly from the immigration laws.

We will show that each of petitioners' premises is fallacious. Petitioners' errors seem to arise from their confusion of the problem of *scope* or *extent* of review—that is, the problem of the *type of issues* judicially reviewable—with the problem of *manner* or *technique* of *getting review*. It is true that the Immigration Act's provision for administrative finality rigidly limits the type of issues reviewable. It is doubtless also true that the issues reviewable are no broader now than they were when habeas corpus was the only method of getting review. But it is equally true that since the enactment of the Declaratory Judgment Act and the A. P. A. there is now an additional *method* of getting the limited review always available by habeas corpus. As stated in the Senate Committee Comparative Print, A. P. A., Sen. Doc. 248, 79th Cong., 2d Sess., pp. 37-38:

> "The exceptions stated in the introductory clause of Section 10 appear to set forth the proper *type of issues* not subject to judicial review." (Emphasis added).

B. Section 19(a) of the Immigration Act of 1917 Does Not Preclude Judicial Review Within the Meaning of Section 10 of the A. P. A.

(1) *The Provision of Section 19(a) That the Attorney General's Decision Shall Be Final Does Not Preclude Review of the Type Here Invoked.*

In the face of the declaration of Section 19(a) of the Immigration Act of 1917, that "the decision of the Attorney General shall be final" in cases where deportation is ordered, it has long been settled that the administrative decision is judicially reviewable where it contravenes constitution or statute, or is made without a fair hearing or supporting evidence. *Gegiow v. Uhl*, 239 U. S. 3, 9 (1915); *Kwock Jan Fat v. White*, 253 U. S. 454 (1920); *Mahler*

v. Eby, 264 U. S. 32 (1924); *Bridges v. Wixon*, 326 U. S. 135, 156 (1945).[10]

Judicial review of cases governed by a statutory declaration of administrative finality is not limited to habeas corpus. Depending on the nature of the case, and the available judicial techniques, review may otherwise be had, e. g., *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329, 334 (1932) (review in immigration case by suit to recover fines); *Perkins v. Elg*, 307 U. S. 325, 349-350 (1939) (review in deportation case by declaratory judgment action); *Estep v. United States*, 327 U. S. 114 (1946) (review in selective service case by defense of improper classification in criminal trial).

As stated for this Court by Mr. Justice Holmes in *Gegiow v. Uhl*, *supra*, at p. 9:

> "The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. * * * The conclusiveness of the decisions of immigration officers under § 25 [which provided that the adverse administrative decision shall be final] is conclusiveness upon matters of fact."

Thus it is clear that the *finality* required by Section 19(a) is effectuated when judicial review is restricted to the *type of issues* historically deemed proper for the court —*matters of law*, to use a shorthand expression. Such

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[10] The United States Commissioner of Immigration and Naturalization, in an address published in *Federal Administrative Procedure Act and the Federal Administrative Agencies*, Vol. VII of N. Y. U. School of Law Institute Proceedings, set out three categories of grounds on which deportation cases have been reversed on court review:

> "1. The order of deportation was not supported by substantial evidence."
>
> "2. The Attorney General's order was not within the scope of his legal authority."
>
> "3. The petitioner was not accorded a fair hearing." (pp. 298-299).

finality is not concerned with the method of obtaining review, since obviously review in a declaratory judgment action can be, and here is, as strictly limited in scope as review by habeas corpus, namely, to a naked question of statutory interpretation.[11]

Thus is thrown into bold relief the error of petitioners' statement that the decision below ignores "both the command of the Congress that the Attorney General's decision shall be final and the traditionally narrow scope of habeas corpus" (Pet. Br. 33).

From any legitimate viewpoint of administrative finality, it matters not one whit whether the narrow issue reviewable be reviewed by habeas corpus or by the more modern, and under the instant facts more civilized, method of a declaratory judgment action. The latter permits adjudication of the naked question of law involved, on behalf of a person concededly of good character and law-abiding habits, without the necessity of arrest, confinement and severance from family and employment.

(2) Habeas Corpus Is Judicial Review Within the Meaning of Section 10 of the A. P. A.

In arguing that habeas corpus is not judicial review, and that therefore its historic availability in deportation proceedings does not mean that such proceedings are subject to "judicial review" within the purview of the A. P. A.'s Section 10, petitioners put themselves in the inconsistent position of contending that the introductory clause of Section 10 expressly contravenes Section 10(b); for the latter clearly states that one form of judicial review is habeas corpus.

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[11] Petitioners themselves state: "It [the instant case] involves only a question of statutory interpretion which can be resolved in habeas corpus proceedings" (Pet. Br. 40).

When it is remembered that Section 10's exclusionary clause—"Except so far as * * * statutes preclude judicial review"—concerns *type of issue*, and that the *type of issue* in a declaratory judgment action can be, as it here is, limited precisely to what could be raised in habeas corpus, it is clear that there is nothing in such exclusionary clause to negate the Act's philosophy, expressly stated in Section 10(b) that habeas corpus is a "form of proceeding for judicial review".

(3) Assuming, Arguendo, That Habeas Corpus Is Not Judicial Review, Nevertheless Judicial Review in Deportation Cases Has Existed Since 1934.

Assuming, *arguendo*, that habeas corpus is not judicial review within the purview of Section 10 of the A. P. A., nevertheless other judicial review of questions of law was available in deportation proceedings at the time of enactment of the A. P. A.

It is true that prior to 1934, the only recognized method of reviewing a deportation case was by writ of habeas corpus. *Fafalios v. Doak*, 60 App. D. C. 215, 50 F. 2d 640 (1931); *Darabi v. Northrup*, 54 F. 2d 70 (C. A. 6th, 1931); *Kabadian v. Doak*, 62 App. D. C. 114, 65 F. 2d 202 (1933); *Imperiale v. Perkins*, 62 App. D. C. 279, 66 F. 2d 805 (1933).

However, in 1934 the passage of the Declaratory Judgment Act furnished an alternative method of review. In 1939, this Court without dissent sustained the use of the declaratory judgment action to test the legality of the deportation of one claiming to be a citizen of the United States. *Perkins v. Elg*, 307 U. S. 325, 349-350 (1939). The *Elg* decision is consonant with Rule 57, Federal Rules of Civil Procedure (effective 1938), which provides in part:

> "* * * The existence of another adequate remedy does not preclude a judgment for declaratory relief where it is appropriate. * * *"[12]

Furthermore, diligent search by counsel on both sides, and the exhaustive opinion of the court below have not produced a single decision, after the passage of the Declaratory Judgment Act, holding that the only method of reviewing a deportation case is by writ of habeas corpus.[13]

Thus, none of the premises relied upon by petitioners to support their argument against the A. P. A.'s authorization of the instant procedure is sustainable.[14] The "finality" of the Attorney General's decision does not preclude judicial review of the narrow type here invoked. Habeas corpus is judicial review within the purview of Section 10 of the A. P. A. and, in any event, judicial review by a declaratory judgment action has existed since 1934.

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[12] The Notes of the Advisory Committee on Rules for Civil Procedure, referring to this provision of Rule 57, explain:

> "* * * A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings."

[13] *Bata Shoe Co., Inc. v. Perkins*, 33 F. Supp. 508, 509 (D. D. C., 1940), contains an *obiter dictum* which appears to follow the earlier cases, but the decision is clearly grounded on the thoroughly sound principle that collective judicial declaration of non-deportability for a large group of immigrant workers would be improper, antecedent as it was to *any* administrative action. The *dictum* states no more than that the issue of non-deportability can be properly raised on the administrative level, and if the administrative decision is adverse, can be judicially decided on habeas corpus.

[14] There is absolutely no inference to be drawn either for or against the position of petitioners from the terms of §106, S. 3455, 81st Cong., 2d Sess., to which they refer (Pet. Br. 29, n. 9). The attempts by both sides to draw inferences from legislation introduced after decisions adverse to the Government under the A. P. A. were rejected in *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47 (1950).

We now turn to a positive showing that under the Declaratory Judgment Act and the A. P. A. the instant procedure is clearly proper.

C. The Plain Meaning of Section 10(b) of the Administrative Procedure Act Makes the Declaratory Judgment Action a Proper Form of Review Under the Instant Facts.

In 1946, after more than ten years of consideration, Congress enacted the A. P. A.[15] Section 10(b) provides:

> "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, *any applicable form of legal action (including actions for declaratory judgments* or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *" (Emphasis added).

It is plain that Section 10(b) expressly makes the declaratory judgment action applicable for review of any administrative proceeding subject to Section 10, with only one class of cases excepted. The single exception exists when there is some adequate "special statutory review proceeding". But *no special proceeding* is provided by statute for the review of deportation cases. Of course, habeas corpus is not a "special statutory review proceeding". The Senate and House Committee Reports make plain that Section 10(b) includes within "any special statutory review proceeding" only these "wholly created by statute" and "*common-law forms referred to and adopted by other statutes as the appropriate method of review.*" (Emphasis added). Sen. Rep.

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[15] A brief and convenient resume of the last ten years of the legislative history of the A. P. A. is contained in the Report of the House Committee on the Judiciary, H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., at pp. 241-250.

No. 752, 79th Cong., 1st Sess.; H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212-213, 276 (1946).[16]

Thus, by Section 10(b)'s inescapable mandate, a declaratory judgment action is now an alternative method of review in deportation proceedings.

D. The Legislative History of the A. P. A. Exhibits Congress' Intention to Approve and Extend the Use of the Declaratory Judgment Procedure Such as This Court Approved in the Case of Perkins v. Elg.

The A. P. A. as finally enacted into law was derived from a bill introduced in the Senate by Senator McCarran in January, 1945. S. 7, 79th Cong., 1st Sess. (see Sen. Doc. No. 248, pp. 1, 11; at p. 155, H. R. 1203 is reprinted, which was identical with S. 7). The McCarran bill (and its House counterpart), as introduced, read as follows:

> "Sec. 10 * * *
> (b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent jurisdiction. *Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure after resort to any adequate agency relief provided by rule or statute, secure a judicial declaration of rights respecting the validity or application of any agency action.* * * *"
> (*Id.*, p. 160, emphasis added).

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[16] Furthermore, the highly respected Advisory Committee on Rules for Civil Procedure stated, in its Notes on the use of declaratory judgments under Rule 57, that "* * * general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings."

The Senate Judiciary Committee, which first considered the bill, issued in June, 1945, an explanatory Committee Print which deleted the portion of S. 7 emphasized above. The explanation given for the deletion was as follows:

> "Although the declaratory judgment 'proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields.' (*Final Report*, Attorney General's Committee, p. 81). In his letter accompanying the veto of the Logan-Walter bill, the Attorney General stated that 'Under the Declaratory Judgments Act of 1934, any person may now obtain a judgment as to the validity of * * * administrative rules, if he can show such an interest and present injury therefrom as to constitute a "case or controversy."' (H. Doc. No. 986, 76th Cong. 3d Sess.)". (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 37).[17]

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[17] The full quotations are as follows:

(a) *Final Report*, Attorney General's Committee, p. 81:

"Since June 1934, the Federal courts have been empowered to grant declaratory judgments in 'cases of actual controversy.' While this proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields. [Citing Borchard, *Declaratory Judgments* (1934)]. The declaratory judgment is a general remedy not confined to any particular type of controversy and having no special provision for administrative law. Its utility for judicial review is, therefore, largely in the control of the courts."

(b) *Letter*, dated December 11, 1940, from the then Attorney General to the President:

"With a purpose no doubt of preventing administrative agencies from magnifying their powers through promulgation of rules, section 3 of the bill conveys a sweeping grant of jurisdiction to the United States Court of Appeals for the District of Columbia:

> upon petition filed by any person substantially interested in the effects of any administrative rule * * * to hear and determine whether any such rule * * * is in conflict with the

Thus it is clear that the broad grant of declaratory judgment jurisdiction contained in S. 7 as introduced was deleted *precisely because the Senate Committee in charge of the bill approved the recommendation of the Attorney General's Committee and accepted the assurance of the Attorney General that judicial review by declaratory judgment actions did not require further grant of jurisdiction beyond that already contained in the Declaratory Judgment Act of 1934.* Since the Act of 1934 already furnished the statutory basis for the district courts to take jurisdiction, no new provision was needed. The statement in the Committee Print clearly approves the use of the declaratory judgment procedure for review of administrative agencies, and encourages it.

Likewise, the rest of the legislative history is replete with affirmations of Congress' belief in the efficacy and desirability of the declaratory judgment as a method of reviewing administrative agencies. The reports of the Committees of the Senate and of the House contained the following observation on the propriety of review by declaratory judgment:

> "* * * The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action." (Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212, 276).

Constitution of the United States or the statute under which issued.

"* * * [The Supreme Court has] adhered to the principle that it will decide only law questions when they arise in concrete litigations coming within the legal concept of a 'case' or a 'controversy.'

"This bill must be interpreted as expanding that power, or it has no effect whatever. Under the Declaratory Judgment Act of of 1934 any person may now obtain a judgment as to the validity of such administrative rules, if he can show such an interest and present injury therefrom as to constitute a 'case or controversy.' This bill removes that limitation or it does nothing." (H. Doc. No. 986, 76th Cong., 3d Sess., p. 6).

Obviously, if a declaratory judgment action to determine the validity or application of agency action is proper before the statutory form of review, *a fortiori*, such form of action is proper where no statutory review proceeding exists.[18]

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[18] Petitioners make much of certain statements made at various times by the then Attorney General (Pet. Br. 46) and by Representative Walter, spokesman for the House Committee (Pet. Br. 45).

(a) In letters dated October 19, 1945, the then Attorney General stated to Senator McCarran and Representative Sumners: "It [Section 10] also restates the law governing judicial review of administrative action." (Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 224, 407). Petitioners would make of this a binding interpretation which in cases subject to Section 10 would freeze the judicial review procedures to those methods of review which were generally employed at the time of the passage of the A. P. A. To construe remedial legislation in such a manner would substantially defeat its purpose, about which other expressions of Congress are so clear. Furthermore, assuming that the statement of the Attorney General be given full weight as indicating that a "freeze" on review procedures was intended, it must be remembered that the *declaratory judgment procedure*, as authorized by the Act of 1934, *was one of the existing methods of review. Perkins v. Elg*, 307 U. S. 325 (1939). See *Final Report*, Attorney General's Committee, p. 81, *supra*.

(b) On May 24, 1946, in the House, Representative Walter, spokesman for the Committee, made the following statement as to Section 10:

> "These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provision for judicial review." Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 369.

The import of this statement is not at all adverse to the respondent's position. The "situation as * * * now generally understood" included the use of declaratory judgment procedure. There are no "special proceedings" provided by Congress for deportation cases. No "venue arrangement" in the sense intended by Representative Walter is being disturbed, because no special court to review administrative cases is being set up, and the general venue

E. Judicial Review by Declaratory Judgment is Appropriate, Convenient and Reasonable in the Instant Situation.

Petitioners' argument, that the practical consequences of the decision below require its reversal (Pet. Br. 56-62), essentially is that declaratory judgment procedure, as compared to habeas corpus, is a less desirable type of review from the administrative viewpoint. We will pass the obvious points that this argument approaches the question almost entirely from the viewpoint of administrative convenience, relegating to the inconsequential considerations of personal liberty; and that inconvenience of administration cannot undo the law.

Petitioners stress the burden of work on the Immigration and Naturalization Service. They say that declaratory actions, if substituted for the allegedly more expeditious and administratively convenient habeas corpus proceedings which petitioners say are adequate, would further unduly burden the Service. They also say that the decision below will result in duplicatory review and will excessively impose upon District of Columbia courts. At best, petitioners' arguments are speculative. Moreover, their underlying assumptions can be shown to be fallacious.

(1) The same reasons which render declaratory review appropriate under the instant facts in order to place the exercise of discretion on a lawful basis, clarify the inadequacy here of habeas corpus. At this stage, habeas cor-

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statutes apply. (Compare the Logan-Walter Bill referred to *supra*, at n. 17(b), in the quotation from the Senate Committee Print of June, 1945.) The "statutory adoption of traditional forms of action" where not in conflict with statutory methods of review includes within the scope of "traditional forms of action", among others, the declaratory judgment action. As stated in Section 10(b), the non-statutory review procedures include "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)."

pus is not available to respondent. He is not in custody.[19] In order to make habeas corpus available, it would be necessary for respondent to go into custody, however sound his substantive case. As stated in the opinion below: "To compel him to go into custody before he can have his rights determined would be to defer to formalism and order the performance of a useless act, an act which may require him to sacrifice his possessions in preparation for leaving the country" (R. 18). Consequently no remedy other than declaratory relief is adequate. At any rate, under Rule 57, Federal Rules of Civil Procedure:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

(2) Petitioners argue that considerations of expediency make restriction of the available remedies to habeas corpus essential. They contend that habeas corpus is a summary proceeding required to be resolved expeditiously.[20] (Pet. Br. 58). But the immediate answer to this is that because of the utility of the declaratory judgment action in securing prompt settlement of issues of this type, Rule 57, Federal Rules of Civil Procedure, provides:

> "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Thus in appropriate cases, declaratory judgment proceedings can be disposed of just as promptly as habeas corpus cases. A district judge would hardly be reluctant to expedite such proceeding on request of petitioners.

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[19] Cf. petitioners' statement of the procedural question (Questions 1 and 2) in their Petition for Certiorari (p. 2) with their statement of it (Question 2) in their Brief (p. 2).

[20] The three weary years in which *Bridges v. Wixon*, 326 U. S. 135 (1945), was in the courts indicates the dubiousness of this assumption.

Many of petitioners' assumptions that great burdens will ensue from the decision below make mountains of molehills. Out of the tens of thousands of deportation hearings in which orders of deportation have been issued in recent years, only the following habeas corpus review proceedings have been commenced in all the Federal district courts:[21]

Fiscal Year	*No. of Proceedings*
1950	217
1949	225
1948	193
1947	260
1946	421
1945	72

Of course, it is scarcely sound for petitioners to argue as they do that the very harshness of the habeas corpus method—requiring the alien to go into custody ready to be deported—has discouraged attempts to obtain review in "thousands" of cases which will now be presented under the declaratory judgment proceeding if the decision below is affirmed. Such an argument impugns either petitioners' own administrative process or the ethics and common sense of the Federal Bar. The direct answer to it is that there are few cases indeed which present, as does the instant one, a naked question of statutory interpretation. Nor is there any substantial risk that the availability of the declaratory judgment in cases such as this—where a non-discretionary question presents itself after exhaustion of administrative remedies but before the alien is taken into custody—will lead to any serious duplication of review proceedings. Well-recognized principles of *res judicata* and collateral estoppel are available to

[21] Figures are taken from Table C(2) in the Annual Reports of the Director of the Administrative Office of the United States Courts for the respective years.

prevent an abuse of judicial process.[22] Furthermore, it is highly probable that any slight increase in the total number of review procedures commenced would be offset by the substantial advantage to the Immigration and Naturalization Service and to the Attorney General in the reduction of the number of administrative deportation proceedings conducted in an erroneous view of the law, or *dubitante* as to the correct statutory interpretation.

(3) Petitioners contend that declaratory judgment actions in this class of cases will burden the courts of the District of Columbia unduly (Pet. Br. 59).[23] To this,

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[22] In so stating, respondent is not unmindful of the holdings that habeas corpus is not subject to the usual rigidity of *res judicata* and collateral estoppel by judgment, e. g., *Salinger v. Loisel*, 265 U. S. 224, 230 (1924); *Price v. Johnston*, 334 U. S. 266, 287-290 (1948). However, as the opinions last-cited make clear, the prior decision *is* binding in so far as the issues later tendered were actually fairly litigated before. Of course, petitioners in posing this alleged difficulty envisage two unlikely situations: (1) that a prior declaratory suit will be accorded no more binding force than is currently accorded to a denial or dismissal of a writ of habeas corpus; (2) that repetitious attempts to obtain judicial reversal of administrative determinations will be more numerous under declaratory procedure than successive petitions for habeas corpus are now.

[23] Of course, if there is any undue inconvenience to the Immigration and Naturalization Service and to the Attorney General in having these few declaratory judgment actions heard in the District of Columbia, perhaps the pressure of business might be redistributed by petitioners' declining to interpose objections for improper venue. Much of the work of the District Court for the District of Columbia has been brought here simply because the Federal agencies insisted that it be litigated here. See the comment of District Judge Hincks on a declaratory suit brought in the District Court for the District of Connecticut: "The parties are before the court; the plaintiff now resides in this district and the defendant very sensibly has appeared without raising any technical questions as to venue which might have required the plaintiff even in these crowded times to file suit in Washington." *Brassert v. Biddle*, 59 F. Supp. 457, 462-463 (D. Conn., 1944), affirmed 148 F. 2d 134.

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there are two brief answers: (i) the Court of Appeals for the District of Columbia has decided that declaratory judgment procedure *is* appropriate for this narrow category of cases and therefore has decided that, on balance, the convenience of the District of Columbia Courts will not be disrupted;[24] (ii) expense, burden, and inconvenience is an argument more properly directed to Congress, which has provided this procedure. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 46-47 (1950).

(4) Lastly, although petitioners formally disclaim reliance on the defense of non-exhaustion of administrative remedies (Pet. Br. 22)—a disclaimer necessitated by good faith in that the fact of exhaustion (R. 3, 4) has never been controverted—nevertheless petitioners continue to make statements which seem to indicate reliance on the theory of non-exhaustion. Thus:

> "If the respondent's contention is upheld, there will be created possibilities for piecemeal review of the deportation process * * * More broadly, all sorts of legal issues relating to deportation could be singled out for judicial review * * *." (Pet. Br. 23-24).
>
> "Administrative action which is not yet reviewable because of failure to exhaust administrative remedies is not made reviewable by the Declaratory Judgment Act" (Pet. Br. 37).
>
> "Thus, judicial intervention is premature until the alien is taken into custody" (Pet. Br. 61).

Therefore we wish to emphasize that in every *theoretical* and *practical* sense, administrative remedies were *utterly* exhausted, and that the case is ripe for judicial determination of the naked question of law involved.

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[24] It must be remembered that in reaching this decision, the court below was fully cognizant that it had held in *Kaminer v. Clark*, 85 U. S. App. D. C. 205, 177 F. 2d 51 (1949), that declaratory judgment procedure was *not* available in cases in which the alien was already in custody in another district and therefore had a ready remedy by petition for habeas corpus (See op. below, R. 18).

Every requirement making declaratory judgment procedure appropriate is present here. The Attorney General, through his authorized agent, the Board of Immigration Appeals, has refused to exercise the power to suspend deportation, *solely on the grounds that the respondent is not eligible for citizenship* (R. 3-4). He has finally decided the only matter that is here relevant: the meaning of a statute. All that remains for petitioner to do is either to depart voluntarily or to go into custody for deportation.

Petitioners would oblige the respondent, in order to test his rights, to sacrifice his possessions, to abandon his work, and to forego the substantial advantage of departing voluntarily to a country of his own choice in lieu of deportation to a designated country. All this would have to be suffered merely because the physical execution of the order has not yet taken place, even though the administrative officials have refused to exercise their discretion to suspend the order, solely because of an erroneous interpretation of the statute. With equal logic, petitioners might argue that habeas corpus would not lie after the alien has been taken into custody under a deportation order, simply because the physical deportation has not yet taken place, and hence the administrative process is incomplete.

Petitioners have had full opportunity to decide the interpretation which should be placed on STSA, Section 3(a), and have made their final decision adversely to respondent.[25] Solely as a result of that erroneous decision, petitioners have refused to exercise their discretionary power of suspension. Respondent does not seek through this declaratory judgment action to control the manner in

[25] Respondent went beyond the requirement of exhaustion of administrative remedies, even obtaining administrative reconsideration (R. 3).

which that discretion is exercised, but seeks only to confine its exercise within the limits of the controlling statutes. As this Court stated, in characterizing the decision in *Perkins v. Elg*, 307 U. S. 325, 349 (1939):

> "Even in some discretionary matters it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction." *Arenas v. United States*, 322 U. S. 419, 432 (1944).

PRELIMINARY STATEMENT FOR QUESTIONS II AND III

The only substantive issue is whether respondent is ineligible for naturalization, as the Attorney General held, solely on the ground that on or about March 30, 1942, he filed with his Selective Service Board Form DSS 301, a Selective Service form provided for the use of aliens applying for exemption from military service under STSA, Section 3(a) (Op. R. 19). The answer depends upon the meaning of two clauses in Section 3(a). The portion of Section 3(a) involved reads:

> "Except as otherwise provided in this Act, every male citizen of the United States, and *every other male person residing in the United States* * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That *any citizen or subject of a neutral country* shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States; *, * *" 54 Stat. 885, as amended December 20, 1941, 55 Stat. 845, 50 U. S. C. A. App. § 303(a).

Respondent's position is:

(i) Respondent was not "residing in the United States"; therefore he was not liable for military service, and the filing of Form DSS 301 was a nullity.

(ii) At the time Form DSS 301 was filed, Denmark, the country of which respondent was then "citizen or subject", was not a "neutral country", and therefore the filing of the form was a nullity.

The court below sustained the first ground and therefore found it unnecessary to decide the second (Op. R. 19-20, n. 6; 24). Either ground is sufficient to require affirmance.

II

RESPONDENT WAS NOT "RESIDING IN THE UNITED STATES"; THEREFORE HE WAS NOT LIABLE FOR MILITARY SERVICE, AND THE FILING OF FORM DSS 301 WAS A NULLITY.

A. Preliminary Statement

Respondent entered this country as a temporary visitor in August 1939 to visit relatives and attend the World's Fair. Caught here by the war, he had to work to earn a living. His employment, a violation of his temporary visitor's status, resulted in a warrant of deportation against him effective May 15, 1941. Thus his temporary visitor's status merged into that of a deportee, which he remained at all relevant times. Therefore he clearly was not "residing in the United States" within STSA, Section 3 (a). A brief preliminary review of the historical background of Section 3 (a) is helpful.

Prior to the so called "Pearl Harbor" amendment to the STSA (December 20, 1941, when Section 3 (a) was amended to read as quoted above), no draft act in Ameri-

can history had subjected any aliens to military service, except those who had declared their intention of becoming United States citizens. Civil War Draft Act, March 3, 1863, 12 Stat. 731; Spanish-American War Draft Act, April 22, 1898, 30 Stat. 361; Selective Draft Act of 1917, as amended, §§ 2 and 5, 40 Stat. 78, 80, 955.

Even STSA as originally enacted in 1940 subjected to military service only "every male citizen of the United States and *every male alien residing in the United States who has declared his intention to become such a citizen* * * *". (Emphasis added; 54 Stat. 885) Not until December 20, 1941, did Congress broaden the definition by making every citizen and every other male person *residing* in the United States subject to military service and training, whether or not they had declared their intention to become citizens. Respondent believes it is clear that Congress by that amendment intended to subject to military service, in addition to declarant aliens, all other aliens ~~who had true~~ residence or domicile in the United States; but that it did not intend to include temporary visitors, sojourners, and most certainly of all, those under warrants of deportation whose actual expulsion awaited only the opportunity of carrying it out.

B. Respondent Was Not "Residing in the United States", and STSA Section 3 (a) Is Inapplicable to Him.

At the time of the passage of the amendment of December 20, 1941, the phrase "residing in the United States" had a well settled meaning in reference to aliens. It has always meant an alien admitted to the United States for permanent residence. See, e.g., Nationality Code, 54 Stat. 1142, 8 U. S. C. A. §707; 59 Stat. 658, 8 U. S. C. A. §1001; Alien Ownership of Land Act, 29 Stat. 618, 8 U. S. C. A. § 72. Conversely, where Congress intends to include all aliens physically present within the United States, it uses appropriate language, e.g., "every alien now or hereafter

in the United States", Alien Registration Act, 54 Stat. 673, 8 U. S. C. A. § 452. Absent any indication of Congressional intent to change the historic meaning of "residing in the United States", there is no reasonable basis whatsoever for concluding that these words in Section 3 (a) include a temporary sojourner under a warrant of deportation.[26] This we think is conclusively shown by precedents in numerous fields, and we shall consider several of the particularly significant fields. Such consideration will make clear that in respondent's status there was *no part* of *any* of the elements significant for residence, namely (i) permanence of stay, (ii) consent of the sovereign, and (iii) freedom of choice.[27]

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[26] As we show hereafter, there is *nothing* in the legislative background of Section 3 (a) to suggest that Congress was so far abandoning reason and history as to subject temporary sojourners to regular military duty.

[27] The Immigration and Naturalization Service, in a decision of its Commissioner, File No. A-6897992, October 10, 1949, listed the following factors generally relevant in determining whether an applicant for admission under the Displaced Persons Act, 62 Stat. 1009, 50 U. S. C. A. App. §1951, ff., had acquired a residence in a country other than the one from which he was displaced and the United States: (1) Length of sojourn; (2) Terms of admission or later modification thereof; (3) Ability to return to the intervening country under the existing regulations of that country controlling the travel of aliens; (4) Activities while in the intervening country; (5) Intentions; (6) Travel documents possessed by the applicant; (7) The presence of other members of the applicant's family who remain in the intervening country; (8) The restrictions placed upon the applicant by the regulations of that country; (9) Whether the applicant was the constant charge of social or humane organizations; (10) The policy of the government of the intervening country with respect to displaced persons, refugees, or other aliens; (11) The attitude of the intervening country with respect to applicants of particular religious, racial or political affiliations. It will be noted that factors (1), (3), (4), (5), (7), (8), relate to the permanence of stay in the country; (2), (3), (6), (8), (10), (11) concern the consent of the sovereign; and (4), (5), (8), (9) involve choice by the applicant.

The status of respondent in the United States was not unlike that of a displaced person in an intervening country, since respond-

1. *"Residence" In International Law*

In international law it is thoroughly established that a temporary visitor or a sojourner is not subject to military service in the country of his visit or sojourn. It has been held that only *citizens or domiciled foreigners* can be subjected to military service. Letter from Secretary of State Seward to Mr. White, July 10, 1868, 79 MS. Dom. Let. 73; quoted in IV Moore, Int. Law Dig., 57; Letter from Secretary of State Fish to Mr. Wing, April 6, 1871, Ms. Inst. Ecuador, I. 263, quoted in IV Moore, Int. Law Dig., 58. The principle was recognized in Art. VI of our treaty with Germany, December 8, 1923, which provides that nationals of the parties to the treaty may be drafted for compulsory military service against a third nation, only if they have *permanent residence* within the drafting nation's territories. 44 Stat. (Part 3) 2136, quoted in III Hackworth, Dig. of Int. Law, 600.

If, as is established, only a domiciliary or alien permanently resident in this country can be subjected to compulsory military service, *a fortiori*, it was not intended that a person like respondent, under a warrant of deportation and here only because it was physically impossible to expel him, should be subject to military service.

2. *"Residence" In Laws Regulating Temporary Visitors*

Our immigration laws draw a clear-cut distinction between an immigrant and a temporary visitor, 43 Stat. 154, 8 U. S. C. A. § 203, 8 CFR (1949) 176.101; 176.106-109;

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ent, although he had left Denmark voluntarily for his intended brief visit in the United States, was forced by the war to remain here, solely because return to Denmark, voluntary or otherwise, was physically impossible. Consequently, much the same considerations which are relevant to the displaced person who, having voluntarily left his country of origin for a temporary sojourn, later found return impossible, are significant in determining whether respondent was "residing in the United States".

176.201-203. An immigrant comes here for permanent residence or domicile, *United States v. Parisi*, 24 F. Supp. 414, 417-418 (D. Md., 1938); *International Mercantile Marine Co. v. Elting*, 67 F. 2d 886, 887 (C. A. 2d, 1933). A temporary visitor is not an immigrant, *United States ex rel. Di Mieri v. Uhl*, 96 F. 2d 92, 93 (C. A. 2d, 1938); he does not receive an immigration visa but a "temporary visitor's visa", 8 CFR (1949) 176.201; 176.106; 119.1-14, such as that given respondent. He is admitted to the United States for a limited period only and must intend to return to the country of his nationality or some other country. Moreover, he will not be given a temporary visitor's visa unless he presents reasonably conclusive evidence that he will be admitted to such country when he leaves the United States, 8 CFR (1949) 119.2(c). Thus a "temporary visitor" like respondent comes here on a conditional grant from the sovereign subject to revocation of his right to be here as soon as he violates his designated status. *Schacht v. Young*, 164 F. 2d 882, 883 (C. A. 5th, 1947). Consequently, when respondent violated his visitor's status by accepting employment and a deportation warrant was issued against him, any reasonable expectation that his stay might be permanent was eliminated. He was merely awaiting physical expulsion from the country. Even though circumstances *forced* respondent to accept employment here, the qualified nature of his right to be within the United States, determined by his original permission to enter brought about the issuance of a warrant of deportation on May 15, 1941. From that time on, until the warrant was withdrawn and his case reopened on June 10, 1946, he was subject to the warrant of deportation. Only physical impossibility due to the war prevented the execution of that warrant. Consequently respondent was not even in the United States as a visitor or sojourner, with the consent (however limited) of the sovereign. Rather he was one physically present, *in invitum*, unable to depart voluntarily, and yet

incapable of being expelled because of physical limitations imposed by hostilities.

3. *"Residence" In General Naturalization Laws*

For purposes of naturalization under the United States Nationality Code, a person must have "resided" here for the statutory period of five years. 54 Stat. 1142, 8 U. S. C. A. § 707. This has been construed to require that the alien be domiciled here. *United States v. Parisi,* 24 F. Supp. 414, 419 (D. Md., 1938); *Petition of Wright,* 42 F. Supp. 306, 307 (E. D. Mich., 1941); *Petition of Oganesoff,* 20 F. 2d 978, 980 (S. D. Cal., 1927). To acquire such residence, the alien must have entered the United States for "permanent residence." *United States v. Kreticos,* 59 App. D. C. 305, 40 F. 2d 1020 (1930), *passim; International Mercantile Marine Co. v. Elting,* 67 F. 2d 886, 887 (C. A. 2d, 1933). Therefore a temporary visit under 43 Stat. 154, 8 U. S. C. A. § 203(2) (such as respondent was making when he came to the United States in 1939), and *a fortiori* a temporary visit which culminates in a warrant of deportation, does not create the requisite residence. For example, an alien whose status was first that of a temporary visitor and then the wife of a treaty merchant, *In re Pezzi,* 29 F. 2d 999 (S. D. Cal., 1928), and an alien who came as a temporary visitor and overstayed his permit, *In re Wieg,* 30 F. 2d 418 (S. D. Tex., 1929), did not fulfill the residence requirement for naturalization although physically present here for the statutory period. Without the approval of the sovereign, physical presence within the boundaries of the United States cannot constitute "residence," *Kaplan v. Tod,* 267 U. S. 228, 230 (1925).

4. *"Residence" In Special Naturalization Laws*

To be eligible for naturalization under the special conditions of the World War II Military Service Act, 56 Stat. 182, 58 Stat. 886, 887, 59 Stat. 658, 8 U. S. C. A.

§ 1001-1002, the alien must have been "at the time of his enlistment or induction a resident [of the United States]." An alien in the United States on a temporary visitor's permit or one subject to a warrant of deportation clearly is not a "resident" within the meaning of this statute. *Ex parte Fillibertie*, 62 F. Supp. 744, 747-748 (E. D. S. C., 1945).[28]

An interpretation which attributes to Congress the use of "resident" and "residing" in contradictory senses, so that permanent residence is required to qualify for privileges incident to military service, while mere physical presence makes the alien subject to the burdens of military service, is too repugnant to elementary concepts of justice for serious consideration.

5. *"Residence" In Decisions Under Various Other Laws*

Furthermore, there was lacking, from the time of respondent's arrival in the United States, until long after the time he filed Form DSS 301 on March 30, 1942, the element of freedom of choice to remain indefinitely which is necessary to constitute "residence". *Neuberger v. United States*, 13 F. 2d 541, 542 (C. A. 2d, 1926); cf. *Matter of Blankford*, 241 N. Y. 180, 149 N. E. 415 (1925); *Harris v. Harris*, 205 Iowa 108, 215 N. W. 661 (1927). Respondent was present here only because the war had made return to his own country impossible.

In *Florica Constantinescu v. Commissioner*, 11 Tax Ct. 36 (1948), an alien similarly situated was held not to be a "resident" for purposes of taxation. In that case, the petitioner, a Roumanian citizen residing in France, had

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[28] Petitioners' assurances—"If [respondent] had wished, as he now declares, to become a citizen of the United States, he could have achieved that ambition most expeditiously by submitting to induction into the armed forces of this country." (Pet. Br. 79)—are indeed hard to reconcile with the *Fillibertie* case.

originally been admitted to the United States in 1939 under a temporary visitor's visa. During the entire taxable year involved, she was under a deportation order which could not be executed because of war conditions. It was held that her physical presence was not sufficient, under those circumstances, to constitute residence.[29] It should be noted that allegiance owed to the *protecting* sovereign is the foundation of the duty to render military service and the duty to pay taxes. To hold that mere physical presence, wholly apart from free choice, is controlling in determining such fundamental obligations, would be to make men mere robots owing duties to whatever force could be brought to bear upon them.[30] Thus petitioners argue, in effect, that the thoroughly established principle of justice which recognizes the correlation between duty owed, and protection granted, was cast aside by Congress, without, as we next see, the slightest discussion of the extent of the change involved. The repugnancy of such a suggestion is obvious.

C. Nothing in the Legislative History of Section 3 (a)'s Amendment Suggests That Congress Intended to Abandon the Established Meaning of "Residing in the United States."

As already noted, Section 3 (a) as originally enacted required military service only of male citizens and "every male alien residing in the United States who has declared his intention to become a citizen." The "Pearl Harbor"

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[29] Similarly persons caught in foreign countries by the course of war have been held not to be resident therein. *McGrath v. Zander*, 85 U. S. App. D. C. 334, 177 F. 2d 649 (1949); *Stadtmuller v. Miller*, 11 F. 2d 732 (C. A. 2d, 1926).

[30] History tells us that the War of 1812 resulted in part from Great Britain's policy of impressing American seamen (who no longer received any protection from the Crown) into service on British men-of-war, on the then-current theory of "once an Englishman, always an Englishman."

Amendment of Section 3 (a), December 20, 1941, changed this to require military service of male citizens and "every other male person residing in the United States."

There is not one word in the legislative history of that amendment indicating a departure by Congress from the well-settled meaning of the words "residing in the United States." Nor can any implication be fairly drawn that the phrase "residing in the United States" in the amendment is equivalent to "being within the United States." It is true that on October 11, 1940, the then Attorney General rendered an opinion to the effect that the words "every male alien residing in the United States", *as employed in Section 2, STSA*, required every alien within the prescribed age limits, who lived or had a place of residence or abode in the United States temporarily or otherwise and for whatever purpose taken or established to present himself for registration under Section 2 (a). 39 Ops. Att'y Gen. 504. Of course, this opinion was limited to the obligation to register. § 2, STSA. It was not concerned at all with the obligation for military training and service. § 3 (a), STSA. Furthermore, no authority was cited and the conclusions were stated in only one brief paragraph.[31]

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[31] The administrative convenience of this interpretation, and its desirability from the point of view of insuring that all manpower subject to the further obligation of military service would be registered with the Selective Service Boards is so obvious as to need no elucidation. But at the same time it is clear that the very reason that the interpretation of the Attorney General appears not to have been questioned in Congress or elsewhere was the triviality of the obligation it imposed. Aliens visiting only for brief periods of time are not surprised at requirements that they make their whereabouts known to authorities. But military service is a further obligation, far from trivial in its nature, and for that very reason common sense repels the conclusion that Congress without discussion of any kind was imposing it upon noncitizens involuntarily and temporarily within our midst.

There is no justification for contending that Congress, when it enacted the amendment of December 20, 1941, extending the obligation for training and service to non-citizens even though not declarant, adopted the Attorney General's interpretation of those words made solely for the purpose of fixing the obligation to register. Nothing indicates that the opinion of the Attorney General was ever called to the attention of Congress. Nor was there any evidence Congress believed that it was changing the previous policy of drafting only *resident declarant aliens,* to the extent of drafting even those persons *only casually within the country* and not "residing in the United States" in any realistic sense of the words.

The December 20, 1941 amendment to STSA was derived from companion (but not identical) bills introduced in the 77th Congress, 1st Session, on December 15, 1941. S. 2126; H. R. 6215. There are only two brief statements by the Committees concerned giving any indication of the meaning of the amendment to § 3 (a)

(i) The first is the Report of the Senate Committee on Military Affairs, December 16, 1941. Speaking of the amendment to § 3 (a), the Report says:

> "2. Several changes are made with respect to the liability of aliens. Under present law, aliens are liable only if they have declared their intention to become citizens of the United States. Under the bill reported by the committee, aliens would be liable whether or not they had declared their intention to become citizens. However, aliens who are citizens or subjects of a neutral country would be relieved of liability upon making application in the manner prescribed by the President, but the making of such application will debar them from ever becoming citizens of the United States. It is provided that enemy aliens shall not be inducted unless they are acceptable to the land or naval forces.

> "3. Liability for service would be extended to certain persons *resident* in the United States who are nationals of the United States but are not citizens thereof, as is the case of some citizens of insular possessions. * * *" (Emphasis added; Sen. Rep. No. 915, 77th Cong., 1st Sess., 87 Cong. Rec. p. 9905, December 17, 1941.)

It will be noted that in the foregoing there is not the least insinuation that Congress was extending Section 3 (a)'s coverage any more broadly than to include non-declarant *resident* aliens, and *resident* nationals. If Congress had intended by the amendment to include mere sojourners, surely something to that effect would be mentioned. Certainly Section 3 (a) before the amendment did not include sojourners; if the amendment had been intended to include them, such would have been a much more drastic change than including resident non-declarants and resident nationals, and accordingly much more worthy of comment. Yet the only comment, in respect of extension of coverage, pertains to such non-declarants and nationals.

(ii) The second relevant statement is in the Conference Report of December 19, 1941. The conference, like most of the debate, had been concerned primarily with the reduction of the minimum age limit for liability to service and training, which eventually was set at 20 years. However, the Report has the following to say about the amendment of § 3 (a):

> "1. The House bill provided that, within the prescribed age limits, the requirements as to registration and the liability for military service should extend to every male citizen and to every male alien and every noncitizen national of the United States *residing* in the United States. The corresponding provisions of the Senate amendment extended such requirement and liability, within the prescribed age limits, to every male citizen and every male person

> *residing* within the United States. There is no substantial difference between the effect of the House language and the effect of the Senate language. The conference agreement adopts the Senate language." (Emphasis added; H. Rep. No. 1554, 77th Cong., 1st Sess., 87 Cong. Rec., p. 10055, December 19, 1941.)

This, likewise, shows no intention in Congress of using the word "residing" other than in its established meaning; certainly no intention that thereafter it would include a temporary sojourner subject to deportation.

The only case cited by petitioners as holding that a "temporary visitor" is "residing in the United States" within the meaning of Section 3 (a) is *Benzian v. Godwin*, 168 F. 2d 952 (C. A. 2, 1948), cert. denied 335 U. S. 886.[32] That case is clearly distinguishable from the case at bar, because no order of deportation had been issued, the alien having received repeated extensions of his temporary visitor's visa. Furthermore, Benzian was clearly a "citizen or subject of a neutral country", Sweden, while respondent, as we show in III, *infra*, was not.

The sole basis for the *Benzian* decision was that in enacting the amendment of December 20, 1941, which fixed the obligation of *military service* (Section 3 (a)), Congress adopted the interpretation made by the Attorney General fourteen months earlier in connection with the obligation of *registration* (Section 2). Thus the *Benzian* decision relied upon the theory that reenactment of an administratively interpreted statute evidences an intention

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[32] The *Benzian* case is not in any event a binding precedent, for it had abated prior to its decision by the court of appeals because the Selective Service Board, as members of which the defendants were sued, had passed out of existence. *Leader v. Apex Hosiery Co.*, 108 F. 2d 71, 81 (C. A. 3rd, 1939), affirmed, 310 U. S. 469. It was on the ground that the cause had abated that the Solicitor General moved to dismiss the petition for certiorari. *Benzian v. Godwin*, No. 317, October Term 1948, Motion of Solicitor General to Dismiss the Petition for Writ of Certiorari and Memorandum in Support Thereof.

of the legislature to adopt the administrative interpretation. This theory the court applied even though the context of the language reenacted was wholly different from the context of the language interpreted by the Attorney General, the reenactment was unaccompanied by any indication of any sort that Congress knew about the administrative interpretation or gave it any weight in its deliberations, and the result produced was in literal conflict with generations of precedents. Such a formalistic application of the treacherous doctrine of legislative adoption by reenactment is, of course, inconsistent with the decisions of this Court. Here there was no long series of administrative interpretations over a period of several years,[33] but rather a single interpretation, comparatively recent and obscure, and certainly not known to have been called to Congress' attention at the time of reenactment. To accept the reenactment as determinative of the legislative intent under such circumstances is at variance with the decision of this Court in *Girouard v. United States*, 328 U. S. 61, 69-70 (1946), in which this Court refused to accept as binding the failure of Congress to reverse a previous construction made by this Court, even though *six different Congresses* had considered and rejected bills designed to change that construction. See also the concurring opinion of Mr. Justice Rutledge in *Cleveland v. United States*, 329 U. S. 14, 22-24 (1946); cf. *United States v. American Trucking Assns*, 310 U. S. 534, 549-550 (1940), where it affirmatively appeared that the basic administrative interpretation had been called to the attention of Congress.

We believe it most unlikely that Congress merely by using the same words, "residing in the United States",

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[33] It is noteworthy that the three cases of approval by reenactment relied upon by the Court of Appeals for the Second Circuit, involved repeated administrative interpretations over periods ranging from 9 to 20 years: *Lang v. Commissioner*, 304 U. S. 264, 270 (1938 [20 years]; *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115 (1939) [19 years]; *Helvering v. Bliss*, 293 U. S. 144, 151 (1934) [9 years]. See 168 F. 2d 952, 956, note 10.

as had been employed in Section 2, was changing its policy with respect to drafting aliens so as not only to reach *resident* non-declarant aliens and nationals, but also to reach all persons whatsoever even those only casually within the United States, *without in any way discussing the radical change involved. Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 791 (C. A. 2d, 1946), affirmed 328 U. S. 275.

We submit there is *nothing* in the legislative history to justify the conclusion that Congress had so unreasonable a purpose as to subject a sojourner under a warrant of deportation to regular military duty.

Clearly, respondent was not "residing in the United States"; Section 3 (a)'s proviso for debarment from citizenship is not applicable to him and he is not ineligible for naturalization on account of it; and an interpretation to the contrary is an error of law.[34]

[34] Petitioners now argue that respondent should have obtained administrative determination of non-residence pursuant to regulations promulgated under STSA, §5 (a) (Pet. Br. 73-74). The applicable provision of §5 (a) authorized the President to specify categories of persons "residing in the United States" who would be exempt from military service. Thus this provision of §5 (a) was limited by its terms, as was §3 (a), to persons "residing in the United States" which, as we have seen, excluded respondent. The regulations are therefore irrelevant here because respondent, by statutory definition, was outside of their reach. Respondent had entered the United States in August, 1939, and none of these regulations was issued prior to February 7, 1942. 32 CFR (1st Ed. Cum. Supp. for period June 2, 1938 to June 1, 1943), §611.21, p. 9122, effective January 29, 1943, authorized an application for determination of residence by an alien within three months after his entry into the United States. It contained no authorization whatever for an application by an alien who had entered the

III

DENMARK, OF WHICH RESPONDENT WAS "CITIZEN OR SUBJECT" WAS NOT A "NEUTRAL COUNTRY," AND THEREFORE THE FILING OF THE CLAIM FOR EXEMPTION WAS A NULLITY.

The claim for exemption, Form DSS 301, which respondent filed on or about March 30, 1942, was a nullity because Denmark was not a "neutral country" within the meaning

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United States more than three months prior to its promulgation. It was not until June 27, 1945 that an amendment to §611.21 was promulgated, §611.21-1, 32 CFR (1945 Supp.), p. 3172, permitting the filing, at any time, of an application for determination of residence for "transmittal to the Director of Selective Service for consideration." Thus it is undisputed that from January 29, 1943, until June 27, 1945, there was no administrative regulation whatsoever under which respondent could have obtained ascertainment of non-residence. However, petitioners for the first time now claim that under §611.21, as originally effective March 16, 1942, 7 Fed. Reg. p. 2084, respondent could have applied for a determination of non-residence up to May 16, 1942. So far as respondent can find after diligent search, §611.21 as effective March 16, 1942, was never printed in CFR but only in Fed. Reg. It will be recalled that it was on March 26, 1942 that respondent's Selective Service Board sent him Form DSS 301, which was filed March 30, 1942. Petitioners' contention assumes that such filing did not cut off the right to obtain an administrative determination of non-residence. The total failure of the regulations to provide norms or standards for ascertainment of residence has resulted in their condemnation as arbitrary and capricious and violative of due process. *Ex parte Asit Ranjan Ghosh*, 58 F. Supp. 851, 853-855 (S. D. Cal., 1944), appeal dismissed, 148 F. 2d 822 (C. A. 9th, 1945). Further, respondent's status as a deportee having been duly fixed on May 15, 1941 by the Immigration and Naturalization officials by issuance against him of a warrant of deportation, it seems clear that no other agency of the Government simultaneously could determine an inconsistent status. As the thought was expressed by the District Court in *Ex parte Asit Ranjan Ghosh, supra*, at 58 F. Supp. 854, "* * * I do not think it is within the contemplation of our system that a man should be fish before one department and fowl before another." For this reason, as well as the reason that respondent's non-residence conclusively appears as a matter of law, an administrative ruling that he was a resident would, in any event, not have been legally sustainable.

of the STSA, Section 3 (a).[35] This contention was argued but not passed upon by the Court of Appeals, because the case was decided in respondent's favor on other grounds (Op. R. 19, n. 6). However, respondent believes that it furnishes an adequate independent basis for affirming the decision below.

In refusing to deny citizenship to a Palestinian subject who had filed Form DSS 301 as a "neutral" alien, the court in *Petition of Ajlouny*, 77 F. Supp. 327 (E. D. Mich. 1948), rejected in the following words the contention that the petitioner had forfeited his eligibility for citizenship:

> "In determining the applicability of [Sec. 3 (a)] to the case of the petitioner, it should be pointed out that it specifically applies to a 'citizen or subject of a neutral country.' Was Palestine in fact a neutral country? The action of the Director of Selective Service in listing it as such did not make it so. It was governed by Great Britain as the mandatory power, and Great Britain was at war long before the registration of the petitioner with his Selective Service Board. * * * It follows therefore, that the petitioner's claim for exemption as a citizen of a neutral country was a nullity and without legal effect, since he was not in fact a citizen of such a country and the section could have no application in his case." (77 F. Supp. at 329-330).

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[35] The section involved reads, in part, as follows: "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That *any citizen or subject of a neutral country* shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States; * * *" December 20, 1941, 55 Stat. 845, 50 U. S. C. A. §303 (a). (Emphasis added.)

Likewise, in the case at bar, respondent's filing of Form DSS 301 was a nullity because he was not the subject of a neutral country. That the claim of exemption would have no effect at all if the registrant was not in fact a citizen or subject of a neutral country is plain from the Selective Service Director's Local Board Memorandum No. 112, dated March 16, 1942, par. 5 (d): "Unless a registrant is a citizen or subject of a neutral country, the filing of an Application by Alien for Relief from Military Service (Form 301) has no effect whatever." (The fact that respondent's Selective Service Board left him in Classification 1-A, available for immediate service, from April 30, 1942 until September 21, 1943, when he was placed in Classification 4-A, past the age of service (R. 4), suggests that the Board itself regarded his Form DSS 301 as ineffectual.)

No conclusive determination of Denmark's status as enemy, cobelligerent, or neutral during the relevant period of World War II has been made by the United States Government. On April 14, 1941, the State Department, apparently with Presidential confirmation, issued a statement that Denmark "can only be regarded as a government which is patently acting under duress and which is in no sense a free agent." In Military Government Law No. 3, Office of Military Government for Germany (U. S.), Title 23, enacted November 15, 1944, Denmark was included in the list of "* * * nations which are signatories of the United Nations Declaration dated January 1, 1942 and nations associated with them in this war * * *." On the other hand, an *ex parte* determination that Denmark was a neutral was made by the Selective Service Director on March 16, 1942, Local Board Memorandum No. 112, and that determination remained unchanged throughout the war (Pet. Br. 64, n. 28). It is submitted that the latter determination was inconsistent with the authoritative decision of the executive branch, and unsupported by the facts. Consequently it cannot govern this case.

During World War II, there never was a Danish government-in-exile. The existing government represented by King Christian X and the Danish Cabinet remained in the homeland, and cooperated with Germany from the occupation on April 9, 1940 to the end of 1942, and perhaps until August 29, 1943.[36] On the other hand, there were certain official and unofficial elements of the Danish Government scattered throughout the world, which cooperated with the United States to the fullest possible extent. These were particularly Henrik de Kauffmann, Danish Minister to the United States, and the Danish Freedom Council in London. The United States Government accorded complete recognition to Kauffmann and executed agreements with him, acting on behalf of the Danish people and their King, which were vital to our war effort.

On account of these circumstances, as the absence of an authoritative determination by the United States Government indicates, the status of Denmark during World War II was at best equivocal. It is hard to tell whether Denmark was allied with our enemy Germany or cobelligerent with us, but it is certain that she was *not* neutral.[37]

In order to show this, little is needed but a skeleton statement of the history of Denmark from 1940 to 1945.[38]

1. On April 9, 1940, the German Army occupied Denmark and Norway (4/9/40, p. 1, col. 8). On the same day,

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[36] See *United States v. Insurance Co. of North America*, 143 F. 2d 53, 54 (C. A. 4th, 1944).

[37] Of course, nationals of Denmark were enemy aliens within the meaning of the Trading with the Enemy Act. *The Rita Maersk*, 52 F. Supp. 56 (D. Mass. 1943), affirmed 144 F. 2d 921; Exec. Order No. 8389, April 10, 1940, 5 Fed. Reg. 1400.

[38] The salient points related here are subject to judicial notice. The references, for convenience sake, are limited unless otherwise noted, to the New York Times, Late City Edition, for the dates indicated, but the vast bulk of the history is available in countless other contemporary newspapers, periodicals, and historical accounts.

Premier Stauning and King Christian of Denmark asked the Danish army and the public to accept the occupation calmly, as *fait accompli*. The German Army of Occupation on the same day issued currency and other regulations in Denmark (4/10/40, p. 4, col. 2). The Danish Minister to the United States, Henrik de Kauffmann, stated that he would refuse to recognize German orders asserting control over Denmark (4/10/40, p. 12, col. 4). April 10, 1940, Premier Stauning announced that his government would remain in office (4/11/40, p. 5, col. 6-7). On that day, the President of the United States issued regulations cutting off commercial intercourse with Denmark (Exec. Order #8389, 5 Fed. Reg. 1400). April 11, 1940, German General Leonhard Kaupisch, head of the army of occupation, announced that Denmark would remain a sovereign state and with that understanding King Christian had agreed to cooperate with the German authorities (4/12/40), p. 10, col. 2). April 12, 1940, Premier Stauning advised the Danish people that the Danish army had decided to acquiesce in the occupation in obedience to the decision of King Christian and the Danish cabinet (4/13/40, p. 4, col. 4). April 15, 1940, a German order was issued controlling employment in Denmark and imposing other restrictions. Premier Stauning urged the Danish people to accept these and other regulations (4/16/40, p. 7, col. 6).

2. April 25, 1940, the President of the United States recognized that a state of war existed between Norway and Germany (Exec. Order #2398, 5 Fed. Reg. 1569). [Please note that Norway and Denmark had been invaded at the same time, and that the former had resisted, but the latter had not.]

3. July 8, 1940, King Christian of Denmark approved a new coalition cabinet. Premier Stauning remained, but Eric Scaevenius, a pro-German, replaced Dr. P. R. Munch as Foreign Minister (7/9/40, p. 10, col. 5).

4. July 24, 1940 and December 2, 1940, the British bombed Danish soil (7/24/40, p. 2, col. 3; 12/2/40, p. 2, col. 4; 12/3/40, p. 3, col. 2).

5. August 16, 1940, Danish youths were jailed for molesting Germans. Premier Stauning issued a warning to the people to remain loyal to Germany (8/16/40, p. 5, col. 2).

6. February 9, 1941, Denmark surrendered ten torpedo boats to Germany (2/9/41, p. 16, col. 1). March 11, 1942, Danish hospitals were requisitioned for German wounded and Danish workers were sent to Germany (3/12/42, p. 13, col. 7).

7. April 12, 1940, Great Britain began seizing Danish ships as enemy property (4/13/40, p. 6, col. 4); February 15, 1941, Chile seized three Danish ships (2/16/41, p. 20, col. 3); March 16, 1941, Peru seized a Danish freighter (3/16/41, p. 19, col. 7); April 6, 1941, Uruguay seized two Danish ships (4/6/41, p. 19, col. 1).

8. April 10, 1941, the President of the United States announced that the United States was taking possession of Greenland, and that an agreement to that effect had been signed between Secretary of State Hull on behalf of the United States and Danish Minister to the United States Kauffmann on behalf of the Danish King (4/11/41, p. 1, col. 8). The State Department announced, in this connection, "so long as Denmark remains under German occupation the Government in Denmark cannot exercise the Danish sovereign powers over Greenland and the agreement, therefore, was signed in Washington." April 12, 1941, the Danish Foreign Office declared the agreement void and recalled Kauffmann (4/13/41, p. 1, col. 5). April 14, 1941, the United States stated that it would ignore the recall, explaining, through a State Department announcement, that:

"* * * the Government of the United States has consistently held since April 9, 1940, and now holds, that the Government of Denmark can only be regarded as a government which is patently acting under duress and which is in no sense a free agent." (4/15/41, p. 8, col. 2).

April 16, 1941, Kauffmann was removed from his office by royal resolution but remained at his post in the United States (4/17/41, p. 12, col. 6).

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9. January 4, 1942, Danish Minister to the United States Kauffmann declined the President's invitation to sign the United Nations Declaration of January 1, 1942 (1/3/42, p. 1, col. 1), stating that he could not sign for Denmark because Denmark was under German duress, but that he pledged the best efforts of the free Danes scattered around the world (1/4/42, p. 36, col. 2). This United Nations Declaration was the reaffirmation of the so-called "Atlantic Charter." January 6, 1942, the Danish Freedom Council in London adhered to the United Nations Declaration (1/7/42, p. 8, col. 6).

10. May 14, 1942, J. Christmas Moller, former Cabinet minister and later Danish Foreign Minister after the Liberation, arrived in England after escape from Denmark; he said the Danish army was still being allowed to call up 3,000 men per year although they normally called more than twice as many (5/15/42, p. 11, col. 2). May 26, 1942, Danish consuls in Australia were dismissed by the Copenhagen Government for refusal to sever relations with the Danish Freedom Council in London, but Australia continued to recognize them (5/26/42, p. 4, col. 7).

11. Beginning September 26, 1942, German-Danish relations were severed for about one week following estrangement resulting from King Christian's curt reply to Hitler's birthday greetings (10/6/42, p. 6, col. 5). November 7, 1942, the Danish government yielded to German pressure, Buhl offering the resignation of the Cabinet. King Chris-

tian asked the pro-German Foreign Minister Eric Scaevenius to form a new government (11/10/42, p. 8, col. 5).

12. August, 1943, unrest was growing steadily among the Danish people (8/18/43, p. 4, col. 1). The United States and her cobelligerents had made landings in the Mediterranean and the U. S. S. R. was repelling the German attack (North Africa, 11/8/42, p. 1, col. 8; Orel, 8/5/43, p. 1, col. 8).

13. August 29, 1943, open resistance to the Germans began. The Danish people scuttled part of the Danish navy. The German occupation forces deposed the Danish government (8/29/43, p. 1, col. 6; 8/30/43, p. 1, col. 8) [August 29, 1943 is the date from which Danish authorities later stated the cobelligerency of Denmark began. See par. 15, *infra.*] August 30, 1943, Premier Scaevenius and Cabinet resigned (8/31/43, p. 1, col. 5). September 1, 1943, Kauffmann and Moller stated that a government in exile was not to be expected and was undesirable (9/1/43, p. 6, col. 4; 9/2/43, p. 4, col. 2). [It is plain from this that both Kauffmann and Moller considered that the government which had collaborated with the Germans at least up to the end of 1942 was the established Danish government.] Secretary of State Hull announced September 3, 1943 that the United States would continue to deal with Kauffmann (9/3/43, p. 3, col. 2).

14. May, 1945, Denmark was liberated by advancing British and American troops (5/4/45, p. 1; 5/5/45, p. 1, col. 8). May 9, 1945, Premier Vilhelm Buhl of the restored Danish government asserted that it was Denmark's wish to join the United Nations and cancel the Anti-Comintern Pact (5/10/45, p. 2, col. 6). [Denmark had entered into the Anti-Comintern Pact with Germany in 1939 and had never withdrawn from it, consequently it seems that the established Danish government was technically cobelligerent with Germany against the U. S. S. R. which during that period was cobelligerent with the United States.]

15. May 21, 1945, Foreign Minister J. Christmas Moller of Denmark made a speech, reading in part as follows:

> "From various quarters I have been asked how Denmark's position today could best be explained, and I believe that I am correct in saying that the Danish Government and the Danish people are of the opinion that they were at war with Germany for many months, nay, for several half-years. What happened, especially on August 29th [undoubtedly referring to August 29, 1943, par. 13, *supra*], was in my opinion, Occupied Denmark's declaration of war to Germany and the Danish Government and the Danish Parliament have sanctioned this line of policy in all respects. * * *" (Records at Danish Embassy in custody of Adam Moltke-Huitfeldt, Secretary).

From the above history, it is plain that Denmark's status was—even in the eyes of our executive department and its subordinate agencies—ambiguous, depending upon which of the operating Danish governmental forces were considered.

It appears that the established Danish Government in the homeland, as represented by the King and Cabinet, was an ally, or pseudo-ally, either willing or unwilling, of our enemy Germany from April 9, 1940 until the end of 1942 and perhaps as late as August 29, 1943. At any rate, Denmark's officials make no claim of having been cobelligerent with the United States until the latter date. Furthermore, Denmark's participation in the Anti-Comintern Pact from 1939 through the end of active hostilities indicates that formally at least Denmark was an ally of our enemy Germany during the entire war. *Sundell v. Lotmar Corp.*, 44 F. Supp. 816 (S. D. N. Y. 1942).

Conversely, from the recognition accorded by the United States to the external agents of the Danish people—notably Minister to the United States Kauffmann and the Danish Freedom Council in London—it would seem that Denmark was regarded as a cobelligerent with the United States

from the very beginning. Kauffmann entered into an agreement authorizing the United States to take possession of Greenland on April 10, 1941, even before we were at war with Germany—action typical of the energy with which the free Danes throughout the world were prosecuting their resistance to the German forces (par. 8, *supra*). And the United States continued its recognition of Kauffmann, even after his recall, because the State Department realized the duress under which the home government acted. This realization was further exemplified by the invitation of the President to Kauffmann to sign the United Nations Declaration on January 4, 1942 (par. 9, *supra*).

The contention made by petitioners that the status of Denmark is a political question which may not be considered here (Pet. Br. 64, n. 28) is without merit. Even though the determination of neutrality is the type of matter usually left for the political branches of the government (cf. Ex parte *Cooper*, 143 U. S. 472, 503 (1892); *Republic of Mexico v. Hoffman*, 324 U. S. 30, 34-35 (1945)) it is necessary that courts interpret the pronouncements of those branches in order to determine what the political judgment was. *The Three Friends*, 166 U. S. 1, 63, 70-71 (1897). And of course such interpretation must be made with greatest care when the political determinations of the subordinate executive agencies, in light of the circumstances, are conflicting. *Connell v. Vermilya-Brown Co.*, 164 F. 2d 924, 927-928 (C. A. 2d, 1947), affirmed 335 U. S. 377, 380. When the interest at stake is as weighty as that of respondent—his eligibility for citizenship possibly for all time—the debarment claimed should be established with exactitude. *Tutun v. United States*, 270 U. S. 568, 578 (1926).

The most authoritative pronouncement on Denmark's status was that of the State Department, April 14, 1941, obviously concurred in by the President, that "* * * the Government of Denmark can only be regarded as a gov-

ernment which is patently acting under duress and which is in no sense a free agent" (par. 8, *supra*). This determination was the basis for the continued recognition of Kauffmann, and was renewed January 1, 1942 (par. 9, *supra*) and again September 3, 1943 (par. 13, *supra*).

Shortly after the above-quoted statement, another executive agency, the Director of Selective Service, issued a memorandum listing Denmark as a neutral country, Local Board Memorandum No. 112, March 16, 1942.[39] This opinion was rendered at a time during which the President and the State Department clearly considered Denmark a tool of Germany, and "in no sense a free agent." It is scarcely possible to perceive how the Director's opinion can stand as a political decision conclusive on the courts—adverse as it was to the President's own determination.[40]

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[39] The basis for that determination was stated by the Director of Selective Service in a letter addressed to Representative Arthur G. Klein, dated December 9, 1948, as follows:

> "Since it was not believed that Denmark should be considered an enemy country and since it was not actively engaged in fighting our enemies and therefore could not be considered as cobelligerent, it was classified for our purposes as a neutral country. This determination was approved by the Department of State."

Despite the last sentence of the above statement, the State Department, in a letter dated November 29, 1948, from Florence Kirlin, Special Assistant to the Counselor, State Department, to Representative Arthur G. Klein, disavowed having made any determination of Denmark's status beyond the statement that Denmark was "a government which is patently acting under duress and which is in no sense a free agent."

[40] In *The Three Friends*, 166 U. S. 1, 70 (1897), although the majority disagreed with Mr. Justice Harlan as to the meaning of the words "colony, district, or people" in the Neutrality Act, there seems to have been no quarrel with his observation that: "The United States cannot be said to be 'at peace', or not 'at peace', with insurgents who have no government except 'on paper', no power of administration, and are merely nomads [as President Cleveland had said]."

Still later, on November 15, 1944, while this Selective Service determination that Denmark was neutral remained on the books, the Office of Military Government for Germany (U. S.), another executive agency, listed Denmark as a cobelligerent. Military Government Law No. 3, Title 23.[41]

The judicial self-limitation represented by the rule that courts will not normally decide political questions is based in large part on the necessity for unity of action in foreign affairs. *Curtiss-Wright Corp. v. United States*, 299 U. S. 304, 319 (1936). However, when the political decisions emitted by executive agencies are so diverse, then there is strong reason for the courts to adhere to the most authoritative—that of the President and the State Department[42]—and to refuse to look to a contrary decision of a subordinate agency, especially when that opinion has no support in the circumstances.[43]

Nor is there any force whatsoever to the suggestion of petitioners that respondent should have pursued an administrative remedy. At the time no administrative pro-

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[41] This determination may have been based on either of two factors:

(a) the recognition accorded to Kauffmann as a cobelligerent;
(b) the uprising of August 29, 1943, in the Danish homeland (par. 13, *supra*).

[42] In the matter of exempting neutral aliens from military service, inextricably linked as it is to our relations with other nations, it is uniquely appropriate that the State Department be the "arm of the President" to determine what countries are "neutral".

[43] Just as *ex parte* administrative interpretations are accorded less weight than *inter partes* decisions, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 290 (1946), so also are interpretations of an agency expert in the field of international relations entitled to greater weight on such an issue as neutrality. Cf. *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549 (1940).

cedure was available for such an inquiry. Since no earlier opportunity was open, respondent may, of course, raise the issue in this action.

We have shown that Section 3(a) is inapplicable to respondent by virtue of its own literal provisions.[44] But

[44] Affirmance of the decision below on the substantive issue is also required for an additional reason, argued in the court below but not discussed in the opinion, of which brief statement will suffice. Section 3(a), STSA, on which the administrative officials predicated their conclusion of ineligibility for citizenship, had expired March 31, 1947. Section 16(b), STSA, as amended, provides:

> "The provisions of the third sentence of section 3(a) of this Act shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act, except the provisions of sections 3(b), 3(c), 3(d), 8 and 16(b), and the fourth and fifth provisos of the second sentence of section 3(a), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date." 54 Stat. 897, 59 Stat. 166, 60 Stat. 181, 342, 50 U. S. C. A. App. §316(b).

Thus by §16(b), certain portions of the Act were saved from the general termination, but the portion of §3(a) debarring from citizenship certain aliens who filed Form DSS 301 was allowed to expire, and so was blotted out as if it had never existed. *United States v. Tynen*, 11 Wall. 88, 95 (U. S. 1871); *Ewell v. Daggs*, 108 U. S. 143, 150 (1883). Although §3(a) had thus lost any possible debarring effect in relation to respondent on March 31, 1947, the administrative orders in this case were issued long after that date, on June 27, 1947, and November 10, 1947 (R. 3).

It is true that the amendment of §28(c) of the Immigration Act of 1924, enacted October 29, 1945, 59 Stat. 551, was relied on in *Benzian v. Godwin*, 168 F. 2d 952, 956 (C. A. 2d, 1948), *supra* at p. 43, as indicating Congress' intention to continue the effective-

apart from its inapplicability for these reasons, we believe that the facts here made clear that Congress *could not* have intended the debarment from citizenship of one in respondent's position. In other words, we believe that the *reason* behind the statute accords with the interpretation necessitated by the language we have discussed. True, Section 3(a) provides that an alien "residing in the United States", who is the "citizen or subject of a neutral country" shall be debarred from citizenship if he makes application to be relieved from military service, without further qualification. But the law is replete with instances where literal phraseology necessarily gives way to the true intention and purpose of the statute. Thus, this Court found it necessary to introduce the "rule of reason" into the blanket language of the Sherman Act, *Standard Oil Company v. United States*, 221 U. S. 1 (1911); *United States v. American Tobacco Company*, 221 U. S. 106 (1911). In *Hecht Co. v. Bowles*, 321 U. S. 321

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ness of §3(a)'s provisions for debarment from citizenship. The amendment reads:

> "(c) The term 'ineligible to citizenship', when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 3(a) of [STSA], as amended * * * or under any law amendatory of, supplementary to, or in substitution for, any such sections;"

This amendment to §28(c) thus merely incorporates §3(a) (subject to the termination provisions of §16(b)) by reference. Perpetuation of §3(a) beyond its termination date is in no way implied.

[1] 1 U. S. C. A. §109 (R. S. §13, as amended March 22, 1944, and July 30, 1947, 16 Stat. 432, 58 Stat. 118, 61 Stat. 633, 635) does not require a contrary interpretation. By the express exception of provisions not to expire, and particularly by the saving provision "as to offenses committed prior to such date [March 31, 1947]," Congress made plain that this was a case in which "the temporary statute shall so expressly provide", for Congress was itself covering the ground which the general rule of construction (1 U. S. C. A. §109) was intended to guard on occasions when Congress was silent. *Great Northern Ry. Co. v. United States*, 208 U. S. 452, 465 (1908).

(1944), it was held that the provision of section 205(a) of the Emergency Price Control Act of 1942, 56 Stat. 33, 58 Stat. 340, 50 U. S. C. A. App. § 925, that upon proper showing an injunction "shall be granted", did not make it mandatory upon the court to issue an injunction, but that the court retained the traditional discretion of equity to grant or withhold an injunction.

A literal interpretation of Section 3(a), devoid of recourse to its true purpose and intent, would produce the absurdity whereby any neutral alien who had ever filed Form DSS 301 would forever be debarred from United States citizenship, even though subsequent to filing it he withdrew it and served voluntarily and heroically in our armed services. We do not believe such a literal application was intended by Congress. What, then, was the purpose of the proviso of Section 3(a) involved?

It seems clear that Congress intended by such proviso to require noncitizens *resident* in the United States to make a rational choice between accepting military service or obtaining relief therefrom, the latter choice to debar them from United States citizenship. As applied to persons who reasonably could make such a choice—and undoubtedly *residents* could—the Congressional purpose was perfectly consistent with this country's fundamental philosophy, that no alien shall be naturalized unless he is attached to the principles of the Constitution of the United States and well disposed to the good order and happiness thereof. Cf. Nationality Code, 54 Stat. 1142, 8 U. S. C. A. § 707(a). Normally an alien resident of this country would not be so attached and disposed if his purpose was to shirk the obligation of defending the country. But this presupposes that the alien had such an obligation and could reasonably be expected to undergo military service.

In this case respondent, a temporary visitor in the country on a sixty-day permit, was caught here by hostilities which prevented his return to Denmark. He was a Danish subject and owed his allegiance to Denmark. It was no fault of his that he was compelled to stay here. Facts are hard things. Respondent found it necessary, in order to live, to accept employment here, thus violating his temporary visitor's status and resulting in a warrant of deportation against him effective May 15, 1941. His status of temporary visitor thus merged into that of a person here not even on sufferance—a person only physically here because it was impossible to expel him. Under such circumstances, it is difficult to see how the filing of Form DSS 301 can have any relevance in connection with respondent's attachment to the principles of our Constitution. There was no choice for him to make. To demand of him military service in the face of the contemplated inevitable ouster of him from the country regardless of service, is to require a standard of loyalty far beyond that which can be expected of anyone. It would be a loyalty that demands all and offers nothing. It is not the kind of loyalty contemplated by a reasonable Congress in enacting Section 3(a).

This is not to minimize the moral reprehensibility of those who had a duty to serve and who shirked it, but to make clear that under the circumstances respondent had no such duty. A claim of relief from an obligation of military service which one does not have, in no way reflects upon his attachment to the principles of our Constitution. *Tutun v. United States*, 12 F. 2d 763 (C. A. 1st, 1926); cf. *Petition of Kohl*, 146 F. 2d, 347 (C. A. 2d, 1945).

CONCLUSION

The judgment below is correct on both the procedural and substantive questions involved, and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 34

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

vs.

PEDER KRISTIAN KRISTENSEN

ON WRIT OF CERTIORARI

BRIEF FOR EINAR RASMUSSEN AND OTHERS, AMICUS CURIAE

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Introduction

This brief is filed on behalf of Einar Rasmussen and others as *amicus curiae* pursuant to Paragraph 9(2), Rule 27 of the Supreme Court Rules as amended. Written consent of all the parties in interest has been granted.

Counsel herein represent several aliens whose cases have been held in abeyance in the Court of Appeals for the District of Columbia pending the decision of this cause. Einar Rasmussen is one of these cases. Rasmussen is a citizen of Denmark who entered the United States temporar-

ily in 1929 as a seaman. He subsequently married an American citizen and has two American born children, all of whom are dependent upon him for support. On April 26, 1943, Rasmussen claimed exemption under the Selective Service Act of 1940 as a neutral alien. On October 4, 1943, he requested permission to withdraw his exemption claim and submitted himself for induction. He was classified 1A, given a physical examination and rejected because of defective vision. In deportation proceedings in 1944 he was granted permission ~~to go~~ to Canada for the purpose of securing a permanent immigration visa and reentering the United States pursuant thereto. In 1946, he received a permanent immigration visa from an American consul in Canada and our Immigration authorities admitted him to the United States for permanent residence.

In 1947 a second deportation proceeding was instituted on the ground that Rasmussen was ineligible to citizenship under the Selective Service Act of 1940 (50 U.S.C. App. 303a) and that he was therefore improperly admitted for permanent residence in 1946. Deportation to Denmark was directed by the Attorney General. Rasmussen has not been in custody and judicial review has been sought in the District of Columbia in an action for declaratory judgment and review under the Administrative Procedure Act. The issues raised in the *Rasmussen* case are similar to those upon which certiorari has been granted in the instant case. If Rasmussen was eligible for citizenship in 1946 his deportation is improper. If judicial review of the order in a declaratory judgment action is appropriate, judgment may be rendered in the Court of Appeals in Rasmussen's favor.

Statement

Respondent, a citizen of Denmark, entered the United States as a temporary visitor in 1939. In 1941 he was or-

dered deported on the ground that he overstayed his visit. On March 30, 1942, on the advice of his draft board that he was ineligible to citizenship and would be deported in any event, respondent claimed exemption from the draft as a "neutral" alien. Thereafter respondent married an American citizen. His deportation proceeding was reopened, the deportation order was withdrawn and he was granted voluntary departure. The sole basis for denying more complete relief in the form of suspension of deportation was because of the legal conclusion of the Attorney General that respondent was ineligible to citizenship by reason of his claim of exemption as a neutral alien. The alien was not detained at the time of institution of suit and is not presently detained. The District Court dismissed respondent's complaint and the Circuit Court reversed this determination holding that respondent was eligible for citizenship. 179 F. (2d) 796.

Questions Presented

1. Whether there may be judicial review of erroneous determinations of law by administrative officials in deportation cases, and if so whether such judicial review may be exercised only in a habeas corpus proceeding.

2. Whether a justiciable issue is presented when an alien is denied discretionary relief in a deportation proceeding upon an erroneous conclusion of law.

3. Whether a citizen of Denmark who claims draft exemption as a neutral alien is barred from citizenship under the Selective Training and Service Act of 1940, 50 U.S.C. App. 303(a).

4. Whether the citizenship bar of the Selective Training and Service Act of 1940 is presently in force.

Summary of Argument

The deportation statute (8 U. S. C. 155-a) is not interpreted to preclude judicial review of determinations of law. A justiciable issue has been presented appropriate for declaratory judgment. The alien was not a citizen of a neutral country and therefore did not incur the citizenship bar prescribed by the Selective Training and Service Act of 1940 (50 U. S. C. App. 303a) which has, in any event, become inoperative so that respondent is presently eligible for citizenship.

I

The Deportation Statute Does Not Preclude Judicial Review

The early immigration cases, including *Lem Moon Sing* v. *United States*, 158 U. S. 538 and *Fong Yue Ting* v. *United States*, 149 U. S. 698 (cited in the Government's brief at pp. 25-26) implied, if they did not hold, that even erroneous constructions of the immigration laws were not subject to judicial review. See *The Secretary of Labor's Committee on Administrative Procedure*, The Immigration and Naturalization Service (1940) at p. 42, *et seq.*; *Davis*, Non-reviewable Administrative Action, 96 U. of Pa. Law Review, 749, 763-5.

Beginning in 1903, with the *Japanese Immigrant Case*, 189 U. S. 86, judicial review of deportation orders was firmly established and expanded.[1] Review of deportation orders and its scope as presently recognized was stated in 1932 by Justice Stone, speaking for the court in *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335:

> "The action of the Secretary is, nevertheless, subject to some judicial review, as the court below held.

[1] The use of habeas corpus to review immigration legislation is almost coeval with that legislation. *Freud*, Administrative Power over Persons and Property (1928) p. 241.

> The courts may determine whether his action is within his statutory authority, compare *Gonzales* v. *Williams*, 192 U. S. 1, *Gegiow* v. *Uhl*, 239 U. S. 3, whether there was any evidence before him to support his determination, compare *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, and whether the procedure he adopted in making it satisfied elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. Compare *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Chin Yow* v. *United States*, 208 U. S. 8, 12; *The Japanese Immigrant Case*, 189 U. S. 86, 100, 101; see *United States ex. Iorio* v. *Day*, 34 F. (2d) 920; *Whitfield* v. *Hanges*, 222 Fed. 745."

This principle was reaffirmed in 1939 in *Kessler* v. *Strecker*, 307 U. S. 22, where Justice Roberts declared:

> "If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside."

Deportation orders have been set aside in recent terms of this Court where the Attorney General misconstrued the applicable statute (*Delgadillo* v. *Carmichael*, 332 U. S. 388; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6) or where the deportation hearing was unfair. *Sung* v. *McGrath*, 339 U. S. 33.

It therefore appears that deportation orders are not final in the sense that they are not subject to judicial review. Nor, is habeas corpus limited in deportation cases to its traditional role to ascertain whether the agency had jurisdiction to act as it is in alien enemy removal cases (*Ludecke* v. *Watkins*, 335 U. S. 160) or selective service cases. (*Eagles* v. *Samuels*, 329 U. S. 304).

Respondent has been ordered to depart voluntarily in lieu of deportation [8 U. S. C. 155(c)(1)]. Provision for statutory finality is made applicable only to aliens "ordered deported." Similiar language is not made applicable to orders to depart in lieu of deportation, although the Government argues that there is statutory finality "in alien deportation cases" (Brief, p. 11).

Section 19(a) of the Immigration Act of 1917 [8 U. S. C. 155(a)] provides that where an alien is "ordered deported . . . the decision of the Attorney General shall be final."

Similar language is utilized in the cases of arriving aliens seeking admission to the United States where it is provided that "the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General" (8 U. S. C. 153). In holding this language inapplicable to questions of law, the Supreme Court stated in *Geigow* v. *Uhl*, 239 U. S. 3:

> "The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act".

A similar construction has been given to provisions in the Selective Training and Service Act making draft board orders final. *Estep* v. *United States*, 327 U. S. 114.

Thus, neither the silence of Congress to provide for judicial review nor provisions for finality have been held to preclude judicial review. *Stark* v. *Wickard*, 321 U. S. 288; *Estep* v. *United States, supra; Davis, supra* 96 U. of Pa. Law Rev. 749, 763-5; *Schwartz*, Administrative Finality and the Administrative Procedure Act, XVII, I.C.C. Practitioners Journal 32, 39. Nor, has judicial review in immigration cases been limited to habeas corpus proceedings.[2] *U. S.*

[2] A proposal to limit judicial review in immigration cases to habeas corpus proceedings was contained in S. 1832, 81st Congress. S. 1832 was later incorporated in Public Law 831 but the proposed habeas corpus limitation was omitted.

ex rel. Trinler v. *Carusi*, 166 F. (2d) 457 (C. A. 3); *Podovinnikoff* v. *Miller*, 179 F. (2d) 937 (C.A. 3); *Camaratta* v. *Miller*, 79 F. Supp. 643; *Kristensen* v. *McGrath*, 179 F. (2d) 796 (C. A. D. C.).

II

Declaratory Judgment is Appropriate

1. *General Considerations.*

Under 28 U. S. C. 2201, in case of actual controversy, except with regard to Federal taxes, any court of the United States, upon filing an appropriate pleading, may declare the rights and other legal relations of any interested party.

The prerequisites for obtaining declaratory relief are: (1) A justiciable controversy; (2) A controversy between adverse parties; (3) A tangible legal interest in the controversy by the party asserting it; (4) An issue ripe for adjudication. *Duvall, Declaratory Actions: Present-Day Uses of a Tested Procedure* (34 American Bar Association Journal (1948) 379).

All four factors noted above exist in the instant case and in a similar situation, Declaratory Judgment has been deemed appropriate. In *Perkins* v. *Elg* (District of Columbia, Equity 63, 408) Judge Bailey held:

> "According to the allegations of the bill, the Department of Labor has notified the plaintiff that she is illegally within the United States and has required her to leave the United States, and in case of her not doing, she would be deported as an alien. *Her only recourse would be to submit to arrest and then seek the issuance of a writ of habeas corpus. I think that this belongs to a class of cases for which a declaratory judgment is eminently suited.*" (Italics supplied).

The Circuit Court of Appeals for the District of Columbia on review said (99 F. (2d) 408):

> "Appellants, Secretary of Labor and Commissioner of Immigration, are required by law to deport aliens illegally in this country and in accordance with law they have threatened her (plaintiff's) arrest and deportation . . . She has not yet been arrested and therefore she cannot now test by habeas corpus the question raised here; but she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights—certainly no less than property rights—and an actual and vital controversy exists between her and the government in relation to them. *The right to be immune from threats of deportation* and from the declarations of public officials that she is an alien and subject to arrest, *is, we think, a right within the declaratory judgment act entitling Miss Elg to prosecute this suit.*"

Upon review by the Supreme Court (307 U. S. 325) it was ruled that:

> "The court below, properly recognized the existence of an actual controversy with the defendants (Aetna Life Ins. Co. *v.* Haworth, 300 U. S. 227) . . . and we think the decree should include the Secretary of State as well as the other defendants."

The issue in this case is one of the eligibility to citizenship rather than citizenship itself. The court below properly applied the principle of the *Elg* case to the controversy here presented. The "construction and interpretation of statutes and ordinances and the question of their application to the plaintiff is a common question of declaratory action." *Borchard*, Declaratory Judgments (2nd ed. 1941) pp. 788-789. There can be no dispute, that the issues here presented fall into this category of cases.

2. *A Justiciable Controversy is Presented.*

The order herein refuses the grant of suspension of deportation on the ground of ineligibility to citizenship. It is only an affirmative grant of suspension which is subject to Congressional review (8 U. S. C. 155 c-2).

Determination of respondent's status—as one eligible or ineligible to American citizenship will not be an opinion "without the power of pronouncing judgment" as was the case in *Gordon* v. *United States*, 117 U. S. 697. The situation here is unlike that in *Chicago and Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112 where Justice Jackson said:

> "Until the President acts, there is no final administrative determination to review . . . Until the decision of the Board has Presidential approval, it grants no privileges and denies no rights."

Here, the Attorney General can and does deny rights without Congressional approval or disapproval. Orders to leave the United States and deportation orders are final administrative determinations subject to no Congressional review. The Government inconsistently urges at one and the same time that the administrative order herein is not final or binding to present a justiciable controversy (Point I) and that it is so final and conclusive as to preclude judicial review (Point II).

Review upon writs of habeas corpus of deportation orders denying suspension of deportation has traditionally been considered justiciable as noted by the Government at page 56 of its brief. Such review has even been extended to an arbitrary refusal to exercise discretion granting suspension of deportation. *Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999 (C. A. 2d). Here review is merely sought of an erroneous legal ruling.

Justiciability can hardly be made dependent upon the fact that declaratory judgment is sought here rather than habeas corpus. Determinations of status as an American citizen have been considered justiciable. *Perkins* v. *Elg*, *supra*. Eligibility for such status should likewise be considered proper for judicial determination as it frequently has in naturalization cases. *Ozawa* v. *United States*, 260 U. S. 178; *Yamashita* v. *Hinkle*, 260 U. S. 199; *United States* v. *Thind*, 261 U. S. 204. That the issue arises in a deportation proceeding should not detract from its justiciable character. A judgment that the respondent is an alien eligible for citizenship will be a determination conclusive upon all concerned with that issue. It will of course leave the Attorney General and Congress free to deny or grant suspension as a matter of discretion. That discretion is not the subject of attack herein. The issue herein is an issue of law, of statutory eligibility to citizenship—an issue that has always been cognizable judicially under Article III of the Constitution.

3. *The Issue is Ripe for Adjudication.*

The Attorney General's determination that respondent is ineligible for citizenship is binding upon all agencies of the government. (Reorganization Plan No. V, See: Note to 5 U. S. C. 133 t.) If respondent leaves the United States as directed he will be ineligible to return to the United States for permanent residence [8 U. S. C. 213(c)]. Temporary readmission will be denied to him under present day practices of excluding visitors who have previously indicated a desire to remain here permanently. If he does not depart and he remains in the United States, he will be deported, barred from reentry and subjected to criminal penalties if he attempts to reenter (8 U. S. C. 180).

It would be harsh to require respondent to be taken into

custody as a prerequisite to testing the issue of law here presented even though he has been twice before the Board of Immigration Appeals and exhausted his administrative remedies.[3] If custody is a prerequisite to judicial review and habeas corpus the exclusive remedy, then an American denied the rights of citizenship in a deportation case would under 28 U. S. C. 2201 be required to submit to incarceration before judicial action would be appropriate. Nevertheless in *Perkins* v. *Elg*, *supra* the plaintiff, a citizen, was told by the immigration authorities to leave the United States with a threat of deportation for noncompliance. It was held that the matter was suitable and ripe for declaratory judgment.

The respondent has been ordered to leave the United States. The Government concedes that "a deportation order will probably issue and he will be deported if he does not depart voluntarily" (Brief, p. 22). The situation is identical with that presented in the *Elg* case. No further administrative relief is open to respondent to test his eligibility for citizenship or his eligibility for suspension of deportation. And if further relief were available, nevertheless judicial review of an issue of law requiring no need for determination of an issue of fact would not be premature. *United States* v. *Sing Tuck*, 194 U. S. 161; *U. S. ex rel. Bradley* v. *Watkins*, 163 F. (2d) 328 (C. A. 2).

The issue of law herein, whether respondent is eligible for citizenship and suspension of deportation, is ripe for adjudication.

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[3] If a gap existed between the exhausting of administrative remedies and taking the alien into custody, it has now been closed by 5 U.S.C. 1009(c). *Scanlan*, Judicial Review under the Administrative Procedure Act, XXIII, Notre Dame Lawyer (1948) 520, 521.

4. *Practical Considerations—Prevention of Economic and Social Waste.*

The announced purpose of declaratory judgment procedure was to prevent economic and social waste. (Senate Report 1005, 73rd Congress, 2d Session, p. 3.)

To require an alien to submit to incarceration in order to seek judicial review in a habeas corpus proceeding means that he must leave his wife, his children, his family and his job and spend his time in a local jail or at an immigration detention center like Ellis Island, while his rights are in litigation. The harshness and social waste of such a procedure needs no elaboration. At the same time, the government must utilize funds for the alien's food, for detention quarters and for the services of the alien's custodian—an economic waste, expended to preserve the formalism of habeas corpus but unnecessary where declaratory judgment may be employed to resolve immigration litigation.

Discretion to refuse declaratory judgment is not unfettered. *Altvater* v. *Freeman*, 319 U. S. 359, 363. In the consideration of this problem the Supreme Court recently said:

> "The actuality of the plaintiffs' need for a declaration of his rights is therefore of decisive importance." *Eccles* v. *Peoples Bank*, 333 U. S. 426.

That there is a need for a declaration of respondent's rights herein is clear. Declaratory judgment will permit an adjudication of the legal relationships herein without requiring expense to the government and inconvenience to the alien which is attendant where he is detained pursuant to an order of deportation. Unlike habeas corpus which requires adjudication after an alien is detained, declaratory judgment will permit an adjudication prior to detention. If habeas corpus is the exclusive remedy herein, then there is

no way in which an alien can secure a judicial determination of his status without surrendering himself to the inconvenience and expense of detention while litigation is instituted and his rights determined.

> "Declaratory judgment procedure . . . may be operative before statutory forms of review are available and may be utilized to determine the validity or application of any agency action." *House Committee Report* 1946 p. 42; S. Doc. 248 79th Congress p. 276.
>
> See also: *Final Report of the Attorney General's Committee on Administrative Procedure,* Senate Document 8, 77th Congress 1st Session at p. 81.
>
> "The distinctive characteristic of the declaratory judgment is that it adjudicates the legal issues between the parties, without providing for the coercive action of execution or performance." *Duvall, supra.*

This is the very purpose of declaratory judgment which will be served herein.

5. *Irrelevant and Immaterial Considerations.*

Practical considerations, as alleged by the government should hardly require reversal or affirmance of the judgment below. (See Government's Brief, p. 56 *et seq.*). Approximately .01% of all deportation cases reach the courts each year. The burden of two or three hundred extra cases a year in the District of Columbia, is one which can easily be borne. If it is believed that these cases should be distributed throughout the land, such result may be accomplished legislatively. The denial of most writs of habeas corpus in deportation cases hardly indicates that they "may have been utilized solely for the purposes of delay." Courts are generally reluctant to override administrative action in cases involving aliens. The Government's conclusion that affirmance of the judgment below

will lead to many declaratory judgment actions in immigration cases "for the purpose of delaying deportation" (p. 60) is pure surmise and speculation which can have no influence in consideration of the questions here presented. Normally attorneys do not institute litigations except in good faith. Normally successive writs of habeas corpus are not sought. Normally, declaratory judgment will terminate litigation. Finally, the comparative rapidity of habeas corpus actions in deportation cases is somewhat exaggerated. These cases are usually defended by the local United States Attorney who communicates with the Criminal Division of the Department of Justice in Washington. The latter, in turn, seeks the file and a memorandum from the General Counsel of the Immigration Service. This roundabout procedure leads to long delays in most alien habeas corpus cases. Declaratory judgment cases can be expedited pursuant to Rule 57 of the Rules of Civil Procedure. Rarely will a judge refuse the Government's request to advance a cause under this rule.

III

Review Is Authorized Under the Administrative Procedure Act

Section 10 of the Administrative Procedure Act 5 U. S. C. 1009 authorizes judicial review except: (a) where a statute precludes it; or (b) where agency action is by law committed to agency discretion. Review may be sought by any person suffering legal wrong or adversely affected or aggrieved.

The legislative history of the Act indicates that review may be obtained in immigration matters. Thus in the House Committee Report (1946) at p. 41 (S. Doc. 248, 79th Cong., p. 275) it was said:

> "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon

its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide review is certainly no evidence of intent to withhold review."

See also: 92 Congressional Record 5654.

In *U. S. ex rel. Trinler* v. *Carusi*, 166 F. 2(d) 457 (C. C. A.-3), the majority of the court concluded that:

"The nub of the question seems to us to be whether these deportation proceedings are such as to fall within the first exception to section 10 as a proceeding provided by a statute which 'precludes judicial review.'

"Our conclusion is that the case does not fall within the exemption.' We are impressed by the fact that in spite of the basic statute's wording habeas corpus proceedings have always been available. Since they have been available the situation cannot be one where judicial review in the past has been precluded. In this we are supported, we think by the discussion found in the legislative history of the Act. In that discussion it was pointed out that statutes which preclude judicial review are unusual."

Subsequently, the Third Circuit declared the action abated because of the failure to make timely substitution of the new Commissioner of Immigration. 168 F. 2(d) 1014. The opinion was not withdrawn and its reasoning and logic remain.

The principle of the *Trinler* case has been reaffirmed in the Third Circuit. *Podovinnikoff* v. *Miller*, 179 F. (2d) 937 (C. A. 3). It has been consistently followed in other jurisdictions. *Kristensen* v. *McGrath*, 179 F. (2d) 796 (C. A. D. C.); *Scholnick* v. *Clark*, 81 F. Supp. 298; *Eisler* v. *Clark*, 77 F. Supp. 610; *Camaratta* v. *Miller*, 79 F. Supp. 643. And usually, where the problem has been analyzed, approval has been given to the views expressed by the majority of the court in the *Trinler* case.

The Impact of the Federal Administrative Procedure Act on Deportation Proceedings, 49 Columbia Law Review (1949) 73, 80;

Schwartz, Administrative Finality and the Administrative Procedure Act, XVII, I. C. C. Practitioners Journal (1949) 32, 39;

61 *Harvard Law Review*, 1445 (1948);

Scanlan, Judicial Review under the Administrative Procedure Act, XXIII Notre Dame Lawyer (1948), 499, 520, 521;

Orlow, Deportation under the Administrative Procedure Act, 22 Temple Law Quarterly (1948) 74.

IV

Respondent Did Not Incur the Citizenship Bar of 50 U.S.C. App. 303-A and Is Eligible For American Citizenship

On the merits, we believe that the judgment below should be affirmed. Denmark was invaded by the Germans on April 9, 1940. United States Military Government Law No. 3 (for Germany) approved and enacted on November 15, 1944, includes Denmark in a list of "nations which are signatories of the United Nations Declaration dated January 1, 1942, *and nations associated with them in this war.*"

On March 30, 1942, when respondent filed D. S. S. 301 claiming exemption as a citizen of Denmark, he was not a citizen of a neutral country. Since the citizenship bar was visited under the Selective Service Act of 1940 (50 U. S. C. App. 303-a) only upon neutral aliens, the respondent was not subject to the said bar. *Petition of Ajlouny*, 77 F. Supp. 327.

The Citizenship Bar of 50 U.S.C. App. 303-A Is No Longer Operative

By virtue of Section 16 of the Selective Service Act (P.L. 473, approved June 29, 1946), Section 3(a) of the Selective Training and Service Act of 1940 became inoperative on March 31, 1947. The Immigration Service realized

that a serious question was thus raised as to whether the naturalization bar remained. It consulted the Assistant Solicitor General who ruled on August 13, 1947, that:

> "An alien who obtained an exemption from military service under this section was assumed to have rendered himself ineligible for naturalization until such time as the courts have passed upon the question." *Monthly Review, Immigration and Naturalization Service*, November, 1947, p. 56, Note 1.

Repeal of the naturalization bar after World War I operated to restore the right to apply for naturalization to those previously barred from naturalization as neutral aliens.

Interpretation 1 of the Immigration Service, June 5, 1941;
In re Carlson, 730-P 2 59687, D.C. Ill. 1942;
Petition of Otness, 49 F. Supp. 220 N.D. Calif. 1943;
Contra: In re Urmenta, 42 F. Supp. 138 (D.C. Wisc. 1941).

It is a commonplace of Anglo-American law that repeal of a statute eradicates it altogether, and the situation is as if it had never existed. 59 *Corpus Juris* 1189, 1190. Expiration of a statute is in this respect the same as repeal.

United States v. *Boisdore*, 8 How. 113;
The Irresistible, 7 Wheat. 551.

Congress, in terminating the Selective Training and Service Act of 1940 was explicit and specific. It directed that the entire Act, with exceptions not here pertinent "*shall become inoperative and cease to apply*" at 12 o'clock noon on March 31, 1947, "except as to offenses committed prior to such Act." (Section 316, 50 U. S. C. App., enacted June 29, 1946). Thus there can be no dispute but that Sec-

tion 3(a) of the Act died on March 31, 1947, without exceptions or savings clause.

In addition, the termination provisions themselves are expressly preserved, including the phrase "offenses committed prior to such date" (March 31, 1947). This clearly refers only to prosecutions under Section 11.

It seems clear that Congress intended thereby to terminate *all* of the provisions of this section, including those creating the disability for United States citizenship.

It is an elementary canon of statutory construction that the grant of one express power or function is also necessarily the implicit exclusion of all others. "*Expressio unius est exclusio alterius.*"

Express enumeration, therefore, of the exceptions and preserved functions contained in Section 16 of the Act, terminating all functions except those enumerated, must necessarily be construed to mean that the citizenship disability created by Section 3(a) was not intended to be preserved.

At common law, the unqualified repeal or termination of a statute, without a saving clause, destroyed all rights and liabilities dependent upon it.

United States v. *Reisinger*, 128 U. S. 398;
Duke Power Co. v. *S. C. Tax Comm.* (C. A. 4, 1936), 81 F. (2d) 513, Cert. Denied 298 U. S. 669.

Statutes which have been enacted in derogation of the common law to prevent criminal prosecutions under the dying statute from being terminated, and to continue in existence criminal penalties, criminal liabilities and criminal forfeitures imposed under the erstwhile statute (*United States* v. *Reisinger, supra*), have been strictly construed [*United States* v. *Hark*, 320 U. S. 531.]

In *Ewell* v. *Daggs*, 108 U. S. 143, the Supreme Court held that after the repeal of a usury statute, a usurious rate of interest, forfeited under the statute while in force, was re-

instated, the interest was payable, and no forfeiture could be enforced. For the life of the statute, the interest rate on the contract constituted a basis for forfeiture of the entire amount of the interest. At the statute's death, the disability fell.

Congress has altered the common law rule and provided that the "expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide . . ." (1 U. S. C. Supp. I, 109, 61 Stat. 633). Racial ineligibility to citizenship (8 U. S. C. 703) has, however, never been considered a "penalty, forfeiture or liability" as the terms are understood in legal parlance. Citizenship ineligibility under 50 U. S. C. App. 303-a has never been so designated judicially. Nor should it be so considered any more than racial ineligibility. Citizenship ineligibility and denial of naturalization have always been designated as the denial of a privilege. *United States* v. *Ginsberg*, 243 U. S. 472; *In re Martinez*, 73 F. Supp. 101, 105.

In *Benzian* v. *Godwin*, 168 F. (2d) 952 (C. A. 2) reliance was placed upon an amendment to the immigration laws (8 U. S. C. 224-c; 59 Stat. 551, October 29, 1945) to establish the proposition that Congress had continued the citizenship bar of Section 303-a of the Selective Training and Service Act beyond March 31, 1947. Prior to October 29, 1945, it had been decided administratively that aliens who claimed exemption from the 1940 Selective Service Act and had become ineligible to citizenship, were nevertheless admissible to the United States for permanent residence. The Attorney General believed that this was an oversight of legislative draftsmanship and recommended that the immigration laws be corrected accordingly. No thought or consideration was then given to the expiration of 50 U. S. C.

App. 303-a.[4]. The assumption of the *Benzian* case that a correction of the immigration definitions contained in 8 U. S. C. 224-c, extended the provisions of the Selective Service Act or evinced an intention to do so, is unwarranted. In addition it should be noted that the *Benzian* cause was moot prior to decision in the District Court. (Memorandum of Solicitor General in the Supreme Court, No. 317, October Term, 1948, Certiorari denied, 335 U. S. 886). It is therefore not persuasive as a precedent.

The passage of Section 3(a) of the Selective Service Act created a new class of aliens ineligible for naturalization—*i.e.*, those neutral aliens who claimed draft exemption. But the termination of the Selective Service Act, without a saving clause expressly preserving that ineligibility, dissolved the newly-created class of ineligibles. The Act created a bar to citizenship, but removed the bar upon its own termination.

[4] The legislative history of the 1945 amendment to 8 U.S.C. 224-c is reflected in the immigration file of Alvaro Valas, 56127/854. Counsel herein was then a member of the Board of Immigration Appeals and participated in that decision.

Conclusion

Neither the immigration statute nor the traditional scope of review in deportation cases warrant a denial of the judgment sought herein. Declaratory judgments in immigration cases will prevent social misery and economic waste, and their use in deportation cases—proceedings which may result "in loss of both property and life; or of all that makes life worth living" should be encouraged.

The Court of Appeals correctly determined that the respondent's eligibility for American citizenship was a matter appropriate for declaratory judgment and it properly declared that the respondent was eligible.

Respectfully submitted,

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